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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 9, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in ..... F.2d ....., and is appended to this petition as Appendix A. The decision of the United States Court of Appeals for the Ninth Circuit in *Hutchison v. Lake Oswego School District No. 7* is reported in 519 F.2d 961 and is appended to this petition as Appendix B. The opinions and the judgment of District Judge Alfonso J. Zirpoli are appended to this petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on December 9, 1975, and this petition for certiorari was filed within 90 days of that date. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Under Title VII of the Civil Rights Act must an employer pay sick leave for absences due to normal pregnancy and delivery?

2. Under Title VII of the Civil Rights Act is an employer prevented from making a factual, medically based determination as to the ability of a pregnant employee to continue working?

3. May an action under Title VII be maintained notwithstanding (1) that the statutory notice of

the right to sue had not been received when the action was filed and (2) that the underlying EEOC charge was defective.

STATUTES INVOLVED

The primary statutes and regulations concerned in this case are 42 U.S.C. §2000e-2(a), 42 U.S.C. §2000e-5(b), 42 U.S.C. §2000e-5(f)(1), 29 C.F.R. §1604.10(b), California Education Code §13456, and California Education Code §13468. The text of these statutes and regulations is appended to this petition as Appendix D.

STATEMENT OF THE CASE

Sonja Lynn Berg was a school teacher employed by the defendant Richmond Unified School District. On December 14, 1972 she notified the District that she was pregnant, that her child was expected to be born on March 24, 1973, and that she requested a pregnancy leave of absence to begin on February 23, 1973, one month before the expected date of delivery (CR 4, 26). On December 20, 1972, Mrs. Berg submitted a further request supported by a statement from her personal physician, that her pregnancy leave begin on March 23, 1973, one day before her expected delivery date (CR 15-16). The District requested that Mrs. Berg have a physical examination by a doctor appointed by the District (CR 18, 27). By a letter from her attorney, Mrs. Berg refused a physical examination (CR 19-22).

One month before her initial leave request, Mrs. Berg had filed an EEOC charge against the District alleging sex discrimination. This charge was not under oath as required by 42 U.S.C. §2000e-5(b) (CR 255). On February 5, 1973 this action was filed in the District Court (CR 1) as a class action based on 42 U.S.C. §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §§2000e, et seq. Jurisdiction was invoked under 28 U.S.C. §§1331 and 1343(3) and under 42 U.S.C. §2000e-5(f) (CR 1).

In opposition to Mrs. Berg's motion for a preliminary injunction the District obtained a medical opinion on the subject of employment for pregnant teachers during the late period of their pregnancy, and adopted a revised "interim" maternity leave policy (CR 44-54). Copies of the affidavit of Maxwell Thebaut, M.D., and of the Richmond Unified School District Interim Maternity Leave Policy are appended to this petition as Appendix E.

The Trial Court issued a preliminary injunction on February 22, 1973, and Mrs. Berg continued teaching until the day before her child was born (CR 71, 231).

On May 14, 1973, Judge Zirpoli granted Mrs. Berg's motion to file a supplement to her complaint alleging that the Department of Justice had issued a right to sue notice on February 21, 1973 (CR 197).

Ultimately, the Trial Court certified a class and granted Mrs. Berg a summary judgment on her Title VII claims, (a) enjoining defendants from denying

Mrs. Berg accumulated sick leave compensation for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery and (b) enjoining defendants from adopting or enforcing policies on commencement and duration of leave, reinstatement and payment of sick leave which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities (CR 326, 327). The judgment of the Trial Court was affirmed by the Ninth Circuit Court of Appeals on the authority of *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir. 1975) and *Wetzel v. Liberty Mutual Insurance Company*, 511 F.2d 199 (3rd Cir. 1975), cert. granted, 421 U.S. 987 (1975) (Appendix A).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN GEDULDIG v. AIELLO, 417 U.S. 484.

The ruling of the Court of Appeals on the merits in this case is that the School District's exclusion of normal pregnancy or childbirth related disabilities from sick leave coverage, and its policy reserving final discretion to compel pregnancy leave violated Title VII of the Civil Rights Act. But in *Geduldig v. Aiello, supra*, this Court stated:

> "Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving preg-

nancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

417 U.S. 484, 496-497, incl. fn. 20, in part.

During the time that this action was pending in the lower courts, California Education Code §13456 specifically authorized school districts to provide for leave of absence due to normal pregnancy, without pay.

In *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, supra, the Ninth Circuit Court of Appeals held that this Court's decision in *Geduldig v. Aiello* was limited to actions under the Fourteenth Amendment and was inapplicable to actions based on Title VII. Over the dissent of Judge Schnacke, the Court of Appeals ruled that a school district sick leave policy excluding pregnancy and childbirth disabilities violates Title VII. A petition for certiorari is pending from that decision (*Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, filed October 10, 1975). The decision of the Court of Appeals in this action is based expressly upon its previous decision in the *Hutchison* case.

Judge Schnacke dissented from *Hutchison* on the ground that this Court's holding in *Geduldig v. Aiello* was controlling and contrary to the decision of the Court of Appeals, 519 F.2d 961 at 968. See also the dissent of Judge Widener in *Gilbert v. General Electric Company,* 519 F.2d 661 at 668 (4th Cir. 1975) cert. granted No. 74-1589, 74-1590, October 6, 1975, sub nom. *General Electric Co. v. Gilbert.*

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2. THE DECISION OF THE COURT OF APPEALS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH IS ALREADY PENDING BEFORE THIS COURT.

This Court has granted certiorari in *Wetzel v. Liberty Mutual Insurance Company, supra, cert. granted* sub nom. *Liberty Mutual Insurance Company v. Wetzel* No. 74-1245, 421 U.S. 987, and in *Gilbert v. General Electric Company, supra, cert. granted* sub nom. *General Electric Co. v. Gilbert* Nos. 74-1589, 74-1590, ... U.S. ..... In both cases the question presented is whether an employer's exclusion of coverage for pregnancy related disabilities from a disability income protection plan constitutes sex discrimination proscribed by Title VII of the 1964 Civil Rights Act.

The instant case, and *Hutchison v. Lake Oswego School District No. 7, supra,* conclude that denial of sick leave benefits in cases of normal pregnancy to teachers by school district employers constitutes sex discrimination proscribed by Title VII of the 1964 Civil Rights Act (as extended to governmental employers in 1972). The *Hutchison* decision which was followed by the Ninth Circuit Court of Appeals in this case, relied upon *Wetzel* in its conclusion that Title VII established a statutory criterion for the determination of employee rights, different from the criterion this Court applied under the Fourteenth Amendment in *Geduldig v. Aiello, supra.*

The decisions of the Courts of Appeals in *Wetzel, Gilbert, Hutchison,* and this case all depend upon the same controlling legal issue: absent invidious discrimination, may an employer lawfully deny paid disability benefits to employees in cases of normal pregnancy.

In this case a permanent injunction has been granted against a public entity in favor of a class, involving accrued sick pay benefits. Amendment of California Education Code §13456, effective January 1, 1976 (Appendix D), has blunted the future effect of the judgment, but the District stands in jeopardy as to accrued claims of Mrs. Berg and the class which she represents. It would be unjust to the District and unsettling to the law to permit the decision of the Court of Appeals in this case to stand if the decisions in *Wetzel, Gilbert,* and *Hutchison* are reversed.

---

3. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL COURT JURISDICTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT WHICH SHOULD BE SETTLED BY THIS COURT.

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court identified two jurisdictional prerequisites to a District Court action under Title VII:

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the

> right to sue, 42 USC §§2000e-5(a) and 2000e-5(e) [42 USC §§2000e-5(a) and 2000e-5(e)]."
>
> 411 U.S. 792 at 798.

Neither of these jurisdictional prerequisites had been met when this action was filed on February 5, 1973. Mrs. Berg's EEOC charged was filed before the District took any action respecting her maternity leave, and her charge was not under oath (CR 255). There was therefore no timely or lawful EEOC charge upon which federal court jurisdiction could be based. Additionally, Mrs. Berg filed suit without having received the required statutory notice of her right to sue. The Court of Appeals held that a preliminary injunction could issue under Title VII without the receipt of notice of right to sue, and that the filing of a supplemental complaint after receipt of the notice operated to cure any initial jurisdiction defect, stating with reference to the language in *McDonnell Douglas Corp. v. Green:*

> "However, we read this statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits."

The holding of the Court of Appeals in this case imposes upon employers a special body of obligations to their employees created by Congress as statutory law under Title VII of the Civil Rights Act, and deprives employers of the procedural protections which the Congress also mandated. Assuming that the statutory theory of *Wetzel* and *Hutchison* is cor-

rect, it is not just to impose those special obligations absent the "procedural niceties" intended by Congress to be effective when the obligations were created.

In any event, the jurisdictional holding of the Court of Appeals cannot be squared with the rule that federal court jurisdiction depends on the facts as they exist at the time suit is commenced and cannot be conferred by subsequent events. [*Minneapolis & St. L. R. Co. v. Peoria & P.U.R. Co.*, 270 U.S. 580 (1926); *National Labor Rel. Bd. v. Atlanta Metallic Casket Co.*, 205 F.2d 931 (5th Cir. 1953); *Royalty Service Corporation v. City of Los Angeles*, 98 F.2d 551 (9th Cir. 1938)].

CONCLUSION

For the reasons discussed above, petitioners respectfully submit that certiorari should issue to review the decision of the Ninth Circuit Court of Appeals.

Dated, January 12, 1976.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-1457

Sonja Lynn Berg, individually and on behalf of all other female employees of the Richmond Unified School District,
Plaintiff-Appellee,

vs.

Richmond Unified School District, Richmond Board of Education, and W. W. Snodgrass,
Defendants-Appellants.

[December 9, 1975]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: MERRILL and KOELSCH, Circuit Judges, and SMITH,* District Judge

KOELSCH, Circuit Judge:

When plaintiff Berg, a school teacher employed by defendant Richmond Unified School District, became pregnant, the defendants—the School District and its

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

officers—acting pursuant to a district policy relating solely to pregnant employees,[1] threatened to (1) require her to cease working on a date earlier than she

---

[1]Two distinct "maternity leave" policies were involved.

The first, which remained in effect well into plaintiff's sixth month of pregnancy, provided that a pregnant permanent certificated employee such as plaintiff take a mandatory leave of absence commencing at the start of the seventh month of pregnancy, and contained no allowance for compensation during the term of such leave.

The second, a so-called "interim maternity leave policy," was adopted during plaintiff's sixth month of pregnancy, and, as revised during her ninth month of pregnancy, provided as follows:

> "Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:
>
> "A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes and pupils.
>
> "B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.
>
> "C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.
>
> "a) The expected date of delivery, and the date to which the physician recommends continued employment.
>
> "b) A statement as to whether the pregnancy is unusual in any respect.
>
> "c) A statement as to the current health of the employee and the foetus.
>
> "d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:
>
> "Maintaining control and direction of approximately 30 active students.
>
> "Staying with a class for periods of not less than one hour without interruption.

and her physician believed necessary and (2) deny her the benefit of accumulated sick leave pay while she was not working. Thereafter, in the fifth month of her pregnancy, plaintiff filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination based on sex.

About two months later, plaintiff requested the EEOC to issue her a "right to sue" letter.[2] She waited in vain for about a month and then commenced this class action in the district court under the purported authority of the Civil Rights Act of 1871, 42 U.S.C. §1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and the fourteenth amendment to the federal constitution. At the same time, she secured a preliminary injunction staying the defendants from their threatened action. Shielded by this order, she continued to teach until the day before her child was born. Meantime, the EEOC did issue its letter, and plaintiff duly supplemented her complaint. Ultimately, the district court granted plaintiff summary judgment on the Title VII claim, certi-

---

"Undergoing jostling and bumping incident to the movement of students on school premises.

"Supervising games and sports of students.

"Coping with student fights, accidents and illnesses.

"Driving to and from work.

"D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement."

[2]The Commission's notification to a charging party under 42 U.S.C. 2000e-5(f)(1) that no conciliation agreement has been entered with the party charged is often referred to as a "right to sue letter (or notice)." *See, e.g., Black Musicians of Pittsburgh v. Local 60-471, American Federation of Musicians,* 375 F. Supp. 902 (W.D. Pa. 1974).

fied a class, issued a permanent injunction against the defendants, and allowed plaintiff attorney's fees.[3] The appeal followed. We affirm.

Defendants' initial contention, that the district court lacked subject matter jurisdiction because no "right to sue" letter had issued at the time of the commencement of the action, is without merit. Putting aside for a moment discussion of the district court's jurisdiction over the Title VII claim upon which permanent injunctive relief was ultimately predicated, we are clear that the district court possessed independent

[3]The judgment of the district court was, in pertinent part, as follows:

"It Is Therefore Ordered, Adjudged and Decreed that:

"(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

"(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by a district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

"(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnacy and delivery;

"(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

"(5) plaintiff's attorney shall be paid reasonable attorney's fees by defendants in the amount of $3,675.00; [and]

"(6) costs shall be awarded to plaintiff against defendants in accordance with plaintiff's memorandum of costs filed in accordance with Rule 124(e) of the Local Rules of this Court."

subject matter jurisdiction to reach the question of preliminary injunctive relief under 28 U.S.C. §1343 (3), based on plaintiff's §1983 claim that she was deprived of her rights to due process and equal protection of the laws.[4]

Section 1343(3) grants the district courts original jurisdiction of civil actions

> "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ."

Because plaintiff's §1983 claim falls within the scope of this language, "§1343(3) . . . conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction." *Hagans v. Lavine,* 415 U.S. 528, 537 (1974). *See Bell v. Hood,* 327 U.S. 678, 682-683 (1946); *Holder v. Nelson,* 514 F.2d 1091, 1092 (9th Cir. 1975).

Applying the test of *Goosby v. Osser,* 409 U.S. 512, 518 (1973), as further elucidated in *Hagans, supra,* 415 U.S. at 536-543, we conclude that plaintiff's §1983 due process and equal protection claims were not "so utterly devoid of merit as to deprive the district court

[4]While the existence of the district court's §1343(3) jurisdiction over the school district and board may be questionable in light of the Supreme Court's subsequent decision in *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), such jurisdiction was clearly present over defendant Snodgrass, the district superintendent.

of its jurisdiction under §1343." *Holder v. Nelson, supra,* 514 F.2d at 1092.[5]

Moreover, it appears to us that the district court had subject matter jurisdiction under Title VII itself to reach the merits of the preliminary injunction issue. In a limited class of cases such as this one, in which there exist both a high probability of the claimants ultimate success on the merits and the threat of irreparable injury of the sort which the Act seeks to avoid, a Title VII claimant may personally bring suit to maintain the status quo pending disposition by the EEOC of the underlying charge of discrimination. *See Drew v. Liberty Mutual Insurance Co.,* 480 F.2d 69, 72-76 (5th Cir. 1973); *Culpepper v. Reynolds Metals Company,* 421 F.2d 888, 893-895 (5th Cir. 1970); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1256-1259 (1971).[6]

And finally, the later issuance of the "right to sue" letter coupled with the filing of the supplemental

[5]The substantiality of the §1983 equal protection claim may have been rendered doubtful by the Supreme Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), and our decision in *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961 (9th Cir. 1975). But both of those decisions were rendered well after the entry of final judgment in the instant case.

Similarly, *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974), and *Turner v. Dept. of Employment Security,* ..... U.S. ....., No. 74-1312 (Nov. 17, 1975), both of which have bearing on plaintiff's due process claim but neither of which clearly dispose of it, were decided well after final judgment here.

[6]As noted in *Culpepper, supra,* 421 F.2d at 894-895, the existence of irreparable injury may in appropriate circumstances be presumed, for purposes of preliminary injunctive relief, from the district court's preliminary determination that Title VII has been violated.

complaint operated to cure any initial jurisdictional defect. *Henderson v. Eastern Freight Ways, Inc.,* 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied,* 410 U.S. 912 (1973); *Jones v. United Gas Improvement Corporation,* 383 F. Supp. 420, 424 (E.D. Pa. 1974); *Dodge v. Giant Food, Inc.,* 3 E.P.D. ¶8184 (D.D.C. 1971), *aff'd,* 488 F.2d 1333 (D.C. Cir. 1973).

True, such letters have often been characterized a "jurisdictional prerequisite" to a lawsuit under Title VII. *See, e.g., McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 798 (1973). However, we read this statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits. *See Jones, supra; Shaffield v. Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp. 937, 940 (M.D. Ala. S.D. 1974); and cases cited therein. *Cf. Davis v. Valley Distributing Company,* ..... F.2d ....., ..., No. 73-2725 (9th Cir. July 30, 1975), slip-op. at 6-7. As noted in *Beverly v. Lone Star Lead Construction Corporation,* 437 F.2d 1136, 1140 (5th Cir. 1971), "[t]he sole purpose of this requirement is to provide a formal notification to the claimant that his administrative remedies with the Commission have been exhausted." *Cf. Stone v. E.D.S. Federal Corporation,* 351 F. Supp. 340, 343 (N.D. Cal. 1972). Under the circumstances here presented—where the district court initially had independent subject matter jurisdiction, and where plaintiff had requested the letter—requiring her to commence a new action would be a pointless exercise in formalism.

Turning now to the merits of the Title VII claim, we note that 42 U.S.C. §2000e-2 broadly outlaws discrimination in employment based on sex.[7] Whether this section prohibits the district policy here under attack is of course a question of statutory interpretation, not one of constitutional analysis. *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, 964 (9th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Company,* 511 F.2d 199, 203 (3d Cir. 1975), *cert. granted,* 421 U.S. 987 (1975).[8]

The defendants take the position that the interim maternity leave policy does not violate §2000e-2 because the policy establishes no sex-based classification —*i.e.,* it is applicable only to pregnant women, not all women. This contention does have a surface appeal when considered against the background of the Supreme Court's dictum in "footnote 20" of *Geduldig v. Aiello,* 417 U.S. 484, 496 n.20 (1974),[9] but it is fore-

[7]Section 2000e-2 provides in part:

"(a) It shall be an unlawful employment practice for an employer—

"(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

"(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

[8]As *Hutchison* makes clear, the prohibitions of Title VII may extend beyond the reach of the Equal Protection Clause. *See also Satty v. Nashville Gas Company,* ..... F.2d ....., ..., No. 75-1083 (6th Cir. Aug. 8, 1975), slip-op. at 8; *Gilbert v. General Electric Company,* ..... F.2d ....., ..., No. 74-1557 (4th Cir. June 27, 1975), slip-op. at 10-15. *But see United States v. Chesterfield County School District,* 484 F.2d 70, 73 (4th Cir. 1973).

[9]In "Footnote 20" of *Geduldig* the Court stated in part:

"While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

closed by our recent decision in *Hutchison, supra.* We therefore reject it.

In *Hutchison,* we held that a school districts exclusion of pregnancy- or childbirth-related disabilities from sick leave coverage was a Title VII violation. In reaching that conclusion, we accorded "great deference," consistent with the teachings of *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971), to the EEOC's interpretation of Title VII as expressed in the relevant guideline promulgated by the agency.[10]

[10]The guideline, 29 C.F.R. §1604.10(b), provides:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

Other circuits have similarly regarded and followed that guideline. *See Satty v. Nashville Gas Company,* ..... F.2d ....., ..., No. 75-1083 (6th Cir. Aug. 8, 1975), slip-op. at 8; *Gilbert v. General Electric Company,* ..... F.2d ....., ..., No. 74-1557 (4th Cir. June 27, 1975), slip-op. at 6-7, *cert. granted,* ..... U.S. ....., Nos. 74-1589/1590 (Oct. 6, 1975); *Holthaus v. Compton & Sons, Inc.,* 514 F.2d 651, 653 (8th Cir. 1975); *Communication Workers v. American Telephone and Telegraph Company,* 513 F.2d 1024, 1030-1031 (2d Cir. 1975); *Wetzel, supra,* 511 F.2d at 206-207; *Farkas v. South Western City School District,* 506 F.2d 1400 (6th Cir. 1974), *aff'g* 8 FEP Cases 288 (S.D. Ohio 1974). *See also Sale v. Waverly-Shell Rock Board of Education,* 390 F. Supp. 784, 787-788 (N.D. Iowa 1975); *Vineyard v. Hollister School District,* 64 F.R.D. 580, 585 (N.D. Cal. 1974).

Hutchison manifests the conclusion that the district policy violates Title VII not only in respect to its denial of sick leave pay during pregnancy-occasioned absences but also in respect to its compulsion of pregnancy leave in the district's discretion. The agency guideline relied on in *Hutchison* interprets the statute as requiring "employment policies and practices involving matters such as the commencement and duration of leave [and] the availability of extensions . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." We are unable to say that "application of the guideline would be inconsistent with an obvious congressional intent

not to reach the employment practice in question," *see Hutchison, supra,* 519 F.2d at 965 [*quoting Espinoza v. Farah Manufacturing Co., Inc.,* 414 U.S. 86, 94 (1973)].

Plaintiff has moved for the allowance of an attorney's fee for the services rendered by her counsel on this appeal. Having duly considered the matter, we conclude that $1,500.00 is a reasonable sum for such services. That sum is allowed as part of the costs. 42 U.S.C. §2000e-5(k).

The judgment is affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 74-3181
No. 74-3182

Barbara R. Hutchison,
Plaintiff-Appellee, Cross-Appellant,

vs.

Lake Oswego School District No. 7, Dr. Thomas Cottle, Edward Allen, Samuel H. Melrose, Jr., Garry R. Bullard, and James S. Putnam, in their capacities as members of the Lake Oswego School District Board,
Defendants-Appellants, Cross-Appellees.

[July 21, 1975]

Appeal from the United States District Court
for the District of Oregon

OPINION

Before: KOELSCH and CARTER, Circuit Judges, and SCHNACKE,* District Judge.

JAMES M. CARTER, Circuit Judge:

Defendants Lake Oswego School District Board ("the school board") and its individual members appeal from the judgment of the district court, enjoining the school board from refusing to grant sick leave benefits for absence due to childbirth, and awarding plaintiff Hutchison lost wages, costs, and attorney's fees against the school board and its individual memebrs. Hutchison, on the other hand, appeals from the district court's dismissal of the Lake Oswego School District No. 7 ("the school district") on Eleventh Amendment grounds. We affirm in part and reverse in part.

Hutchison was employed for two school years by the school district as a part-time junior high school teacher. On January 27, 1973, she gave birth to a child, necessitating her absence from work for 15 working days. She suffered no complications as a result of either her pregnancy or childbirth. Upon her return to work, she requested that she be allowed sick leave benefits for her absence—she had accured 15 days sick leave at that time.

The school board refused her request on the basis of § 415.1 of the school district's Policies and Procedures and Ore. Rev. Stat. § 342.595, both providing

*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

for a minimum amount of sick leave for "illness or injury." Pregnancy was not deemed to be an "illness or injury" but rather a temporary disability permitting leave without pay. This interpretation was rendered by the superintendent of the Lake Oswego Schools and concurred in by the Director of Legal and Executive Services for the Oregon State Department of Education. The sum of $339.59 was deducted from Hutchison's wages because of her absence from her job and the necessity of hiring a replacement during her absence.

After exhausting all possible administrative remedies, she brought the present suit seeking a declaration that the school district's maternity leave policy constituted sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). She also sought damages under 42 U.S.C. § 2000e-5(g), and attorney's fees under 42 U.S.C. § 2000e-5(k).

The case was submitted without trial on the briefs and certain stipulated facts. The district court dismissed the school district on the basis of sovereign immunity, but found that the school board and its individual members had engaged in unlawful sex discrimination in violation of both the Equal Protection Clause and Title VII.

The defendants contend on appeal that: the refusal to grant sick leave benefits for normal pregnancy violates neither the Equal Protection Clause nor Title VII; the recovery of back pay and attorney's fees

from the individual school board members is barred by the doctrine of qualified immunity for acts done in good faith and within the scope of their official duties; and such recovery against the school board is barred by the Eleventh Amendment. Hutchison contends that the doctrine of sovereign immunity was improperly applied to the school district.

EQUAL PROTECTION

The decision of the district court was rendered prior to the Supreme Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), which held that the State of California was not required by the Equal Protection Clause to provide for absences due to normal pregnancy and childbirth under its state disability benefits plan. The Court stated that the State has a legitimate interest in "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately." *Id.* at 496. And with respect to the contention that discrimination on the basis of pregnancy constitutes "invidious discrimination" for purposes of equal protection, the Court stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing

> that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* at 496-497 n.20.

The operation of Oregon's sick leave benefits plan differs somewhat from California's disability benefits plan, and, unlike the *Geduldig* defendant, the defendants in the present case did not make a strong showing below that the exclusion of normal pregnancy from the sick leave policy was necessitated by the increased administrative burden and cost of including such pregnancy. However, we hold that *Geduldig* dictates a similar result in the present case.

Hutchison has not suggested that the policy is a mere pretext designed to effect an invidious discrimination. And inclusion of normal pregnancy in the school district's sick leave plan would unquestionably "be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits . . . , or some combination of these measures." *Geduldig, supra,* at 495-496. We hold that Hutchison cannot validly base her claim on the Equal Protection Clause.

TITLE VII

The defendants concede that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* is applicable to the employment practices of the school board, and that the policy in issue is an "employment practice" within the meaning of Title VII. However, they rely upon Footnote 20 of *Geduldig, supra,* to support their contention that discrimination on the basis of pregnancy is not sex discrimination. But the defendants have greatly overstated the reach of *Geduldig* in general and Footnote 20 in particular.

First, the school district cites Footnote 20 as if it states that discrimination on the basis of pregnancy is *never* sex-based. That is not what the Footnote provides. Rather, it states that not *every* legislative classification concerning pregnancy is sex-based.

Second, in *Geduldig* the Court was considering whether such classification violated the Equal Protection Clause. Title VII was not at issue. The school district contends that since the threshold question under Title VII is whether or not there has been discrimination on the basis of sex, and since the Supreme Court in *Geduldig* has stated that exclusion of pregnancy benefits under a state disability plan is not sex-based, the Court decided the Title VII issue sub silentio.

Title VII, however, unlike the Equal Protection Clause, proscribes classifications which *"in any way* would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely*

affect [her] status . . ." (Emphasis added.)[1] This language certainly is conducive to an interpretation different from that premised upon the language of and cases interpreting the Equal Protection Clause. "In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance upon [*Geduldig*] is misplaced." *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 203 (3 Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (5/27/75).

To effectuate the goals of Title VII, Congress entrusted the promulgation of regulations or guidelines thereunder to the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-4. The guidelines so promulgated are the agency's interpretation of the statute and indicate what are or are not proscribed discriminatory practices. *Wetzel, supra*, 511 F.2d at 204. These EEOC guidelines are entitled to "great deference" with respect to the proper interpretation of Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The EEOC guideline applicable to the school board's sick leave policy in the present case unequivocally

[1]Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

"It shall be an unlawful employment practice for an employer—

(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or

(2) . . . classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ."

provides that the exclusion of pregnancy or childbirth related disabilities from sick leave coverage is a violation of Title VII.[2] Unless "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question", the school board's sick leave policy must be deemed to be violative of Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

In enacting Title VII, Congress intended to eliminate all discriminatory employment practices, H. Rep. No. 914, 1964 U.S. Code Cong. & Admin. News 2401, including discriminatory treatment of men and women. *See Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7 Cir.), *cert. denied*, 404 U.S. 991 (1971).[3] Clearly, a sick leave policy which excludes from coverage absences related to pregnancy or childbirth adversely and disparately affects women with

[2]29 C.F.R. § 1604.10(b) provides:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

[3]"The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis, supra*, 444 F.2d at 1198.

respect to employment benefits. This interpretation is in no way inconsistent with the language of Title VII or congressional intent to eliminate all employment practices which discriminate on the basis of sex. In fact, "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications." *Frontiero v. Richardson,* 411 U.S. 677, 687 (1973). *See also* 1972 U.S. Code Cong. & Admin. News 2137 (House Report concerning sex discrimination and the 1972 amendments to Title VII).

In *Sprogis, supra,* it was stated with respect to Title VII: "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy." 444 F.2d at 1198. We decline to ratify such discrimination under the facts of this case and in light of a reasonable EEOC guideline specifically proscribing the exclusion of pregnancy from sick leave coverage.

In the proceedings below, the defendants placed all of their "eggs" in the Footnote 20 "basket". On appeal they contend that the exclusion of childbirth from their sick leave policy is justified because pregnancy is voluntary and is not an "illness or injury", and because of the administrative burden and cost engendered by adding pregnancy and childbirth related disabilities to the sick leave coverage. In support of this latter defense, they cite statistics in the Brief of Amicus Curiae American Telephone and Telegraph Company.

We do not consider factual and legal defenses raised for the first time on appeal. We do note, however, that administrative costs which might justify an employment practice for purposes of equal protection would not necessarily constitute an adequate defense under Title VII. Further, we must assume that the EEOC was aware of the increased costs that would be required in order to comply with its guidelines. And finally, those circuit courts and the majority of district courts which have considered the defenses raised by the school district have held them to be without merit. *See, e.g., Wetzel, supra,* at 206: "Under Liberty Mutual's policy, all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand." *See also Gilbert v. General Electric Co.,* ..... F.2d ....., 44 U.S.L.W. 2013 (4 Cir. June 27, 1975); *Farkas v. South Western City School Dist.,* 506 F.2d 1400 (6 Cir. 1974), *aff'g* 8 FEP Cases 288 (S.D. Ohio 1974); *Vineyard v. Hollister School Dist.,* 64 F.R.D. 580, 585 (N.D. Cal. 1974); *Sale v. Waverly-Shell Rock Bd. of Educ.,* 390 F.Supp. 784, 788 (N.D. Iowa 1975).

ELEVENTH AMENDMENT—SOVEREIGN IMMUNITY

In *Edelman v. Jordan,* 415 U.S. 651 (1974), the Supreme Court held that retroactive welfare payments awarded against the Illinois Department of Public Aid were barred by the Eleventh Amendment,

proscribing monetary awards against a State. In the present case, the district court awarded Hutchison sick leave benefits, costs, and attorney's fees under 42 U.S.C. § 2000e-5(k) against the school board and its individual members, but dismissed the school district. The defendants contend that *Edelman, supra,* bars an award of back pay or attorney's fees against either the school district or school board. We disagree.

The most important factor in determining whether a particular agency is the "alter ego" of the State for Eleventh Amendment purposes is "whether payment of a judgment will have to be made out of the state treasury, i.e., whether the fund in question has both the independent power and resources to pay the judgment without further action by the state legislature or other governmental officer." *Bowen v. Hackett,* 387 F.Supp. 1212, 1221 (D.R.I. 1975). Also important to our decision are the following factors: performance by the entity of an essential government function, ability to sue or be sued, power to take property in its own name or in the name of the State, and corporate status of the entity. *George B. Whitten, Jr., Inc. v. State University Construction Fund,* 493 F.2d 177 (1 Cir. 1974).

The autonomous nature of school districts (and their administrative arms, the district school boards) in Oregon with respect to the factors noted above is evident from a reading of the relevant Oregon statutory provisions. Of primary importance is the fact that most of a school district's financing comes from local and not state-wide sources. Although the State

does aid the various school districts, the amount is based upon the number of resident students and may not be used as an offset to the school district's own tax levy. Ore. Rev. Stat. § 327.090.[4] Therefore, the Lake Oswego School District has the *power* to obtain funds to satisfy a monetary judgment, and is precluded from applying *State* funds to offset such a levy. A set amount of State aid is awarded each year on the basis of the number of students, an amount which would not be altered by the back pay award in the present case.

With respect to the other relevant factors, school districts are "bodies corporate", § 332.072,[5] and the district school boards may sue and be sued, § 332.072, may condemn property for school purposes, § 332.182,[6]

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[4]"327.090 Apportionments as revenue; limitation on use. The amount to be received from the Basic School Support Fund shall be included as revenue in the budget of each school district. No part of such fund shall be apportioned and distributed to apply as an offset to a school district tax levy."

[5]"332.072 Legal status of school districts. All school districts are bodies corporate, and the district school board is authorized to transact all business coming within the jurisdiction of the district and to sue and be sued. Pursuant to law, district school boards have control of the district schools and are responsible for educating children residing in the district."

[6]"332.182 Condemnation of realty for school purposes. (1) Whenever it is necessary for any school district to acquire any real property for necessary school purposes, and the owner of the real property and the district school board cannot agree upon the price to be paid therefor, and the damage for the taking thereof, if any, the district school board may commence and prosecute any necessary or appropriate action for the condemnation of the real property required for school purposes. The title acquired by any school district by any such action shall be a fee simple title.

(2) The procedure for condemnation shall be the procedure provided by law for condemnation of land or rights of way by public corporations or quasi-public corporations for public use or for corporate purposes."

and may contract indebtedness, § 328.565.[7] We hold that the analysis of the court in the recent case of *Gordenstein v. The University of Delaware,* 381 F. Supp. 718, 722-723 (D. Del. 1974), is equally applicable to the school district and school board in the present case:

> "Since the state treasury is insulated from a judgment in the plaintiff's favor, since the University has both the funds and the legal power to satisfy such a judgment, and since under Delaware law the University is an independent corporation exercising virtually complete fiscal and educational autonomy, this Court concludes that the University is not an arm or alter ego of the State of Delaware under the Eleventh Amendment and therefore is not immune from suit. The

[7]"328.565 Power to create indebtedness for current expenses and bond retirement; limitation. (1) Any district school board may contract indebtedness by the issuance of warrants or short-term promissory notes for the purpose of meeting current expenses, retiring outstanding bonds or warrants or paying the interest thereon, whenever provision therefor has been made in its duly adopted budget. In the exercise of the authority given in this subsection, the district school board may contract or refund short-term loans which shall at no time exceed in the aggregate 80 percent of the ad valorem taxes upon real and personal property theretofore levied and remaining uncollected for such school district for the tax year in which the warrants or notes are issued and 80 percent of other budgeted and unpledged revenues which the district school board estimates will be received from other sources during such tax year.

(2) A district school board may, at its option, borrow moneys pursuant to this section or ORS 287.402 to 287.432."

Such indebtedness may be paid by means of a *district-wide* tax levy:

"328.555 Property liable for district indebtedness; tax levy. (1) All taxable property in a school district at the time any indebtedness is incurred by such district and all taxable property subsequently located in the area comprising such district shall be liable to taxation for the payment of such indebtedness until paid."

> fact that the University may be assisting the State of Delaware in the performance of a governmental function is not determinative." (Citations omitted.)

Our holding that neither the school district nor the school board as a body is immune from suit obviates the necessity of deciding two additional contentions raised by Hutchison: (a) that even if this is deemed to be a suit against the State, attorney's fees may be awarded in conjunction with the granting of prospective injunctive relief;[8] and (b) that the state in ratifying the Thirteenth and Fourteenth Amendments *consented* to Congress' authority under the enabling clauses of those Amendments to make state and local governments amenable to suit in federal court by individual employees.[9]

[8]This contention finds support in the recent cases of *Souza v. Travisono,* ..... F.2d ....., 43 U.S.L.W. 2402 (1 Cir. 3/11/75), and *Downs v. Department of Public Welfare,* ..... F.Supp. ....., 43 U.S.L.W. 22 70(E.D. Pa. 12/20/74). In *Downs* the court held that "an award of counsel fees is both clearly remedial and an integral part of a decree providing prospective relief from violations of federal statutory and/or constitutional rights." Since such fees are incidental to prospective injunctive relief, are necessary to the future compliance with federal law (private attorney general theory), and have a minimal impact on the State treasury, "the Eleventh Amendment does not bar an order directing individual defendants to satisfy an award of attorneys fees from state funds." *Id.* at 2271. *See also Jordan v. Fusari,* 496 F.2d 646, 651 (2 Cir. 1974); *Class v. Norton,* 505 F.2d 123, 126 (2 Cir. 1974).

[9]*But see generally Skehan v. Board of Trustees, Bloomsburg State College,* 501 F.2d 31, 42-43 n.7 (3 Cir. 1974); *Jordan v. Gilligan,* 500 F.2d 701, 708-710 (6 Cir. 1974).

QUALIFIED IMMUNITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

Finally, the individual members of the school board contend that they are protected by a qualified "good-faith" immunity from liability for damages. We agree. In *Scheuer v. Rhodes,* 416 U.S. 232, 247-248 (1974), the Supreme Court stated: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Recently, this qualified immunity was extended to school board members acting in good faith, *Wood v. Strickland,* ..... U.S. ....., 43 U.S.L.W. 4293 (February 25, 1975). The Court stated: "The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice." *Id.* at 4298.

Although the Court was dealing with student discipline in *Wood,* the principles enunciated are equally applicable in the present circumstances. The school board members did not disregard "settled, indisputable law" since the courts themselves have been split as to whether or not pregnancy may permissibly be excluded from sick leave coverage. The school board specifically asked the State Director of Legal and Executive Services for a ruling on the issue and acted in reliance thereon. Although we conclude that

the school board's exclusion of pregnancy and childbirth related disabilities from sick leave coverage violated Title VII, the board members clearly acted in good faith and within their official capacities and are therefore entitled to qualified immunity from the payment of damages.

We affirm that portion of the district court's judgment and opinion finding that the Lake Oswego School District Board's sick leave policy violates Title VII, enjoining exclusion of pregnancy and childbirth related disabilities from the plan and awarding back pay, costs, and attorney's fees against said Oswego School District Board. We reverse the judgment and opinion so far as it dismisses the Lake Oswego School District No. 7 and holds liable the individual school board members for back pay, costs, and attorney's fees, and we direct that judgment be entered for Hutchison and against Lake Oswego School District No. 7, jointly and severally with Lake Oswego School District Board, for back pay, costs and attorney's fees; finally, we reverse that portion of the judgment and opinion finding the sick leave policy to be in violation of the Equal Protection clause of the Fourteenth Amendment.

The cause is remanded for entry of judgment accordingly.

SCHNACKE, District Judge (concurring and dissenting).

I agree that defendants' conduct does not violate the Equal Protection Clause. But I do not believe it violates Title VII either.

The Supreme Court, in *Geduldig v. Aiello,* 417 U.S. 484, 496-497, incl. fn. 20, stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

The Court was clearly saying that any discrimination in California's program was not because of sex and that any adverse effect the program's classifications had on plaintiffs there was not in any way due to their sex. A program with such characteristics would not involve illegal sex bias under Title VII [see 42 U.S.C. §2000e-2(a)], and the school district's sick leave plan is such a program. Plaintiff here has not suggested that the district's "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one

sex or the other" [see *Geduldig v. Aiello, supra* at fn. 20]. On the contrary the district simply made a reasonable, good faith decision to cover only "illness or injury" in their program and, on good authority, determined that pregnancy is not an illness or injury. (The California program also covered only illnesses and injuries.)

Thus, there are compelling indications that the EEOC guidelines are wrong in treating the district's pregnancy exclusion as a Title VII violation, so that courts need not defer to them on this point [*Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 94-95 (1973)].

Since I do not think plaintiff here has any claim on which a federal court may grant her relief, I express no opinion as to whether the Eleventh Amendment bars non-injunctive relief against defendants school district and school board or whether defendant school board members are individually liable for damages.

Appendix C

United States District Court
for the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc., Plaintiff,
vs.
Richmond Unified School District, et al., Defendants.

[Filed Feb. 22, 1973]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, a teacher employed by defendant school district, is pregnant; she anticipates delivery of her child on or after March 24, 1973. Her attending physician has determined that she may safely work until the date of her confinement, and plaintiff wishes to do so. The school district, however, has an "interim policy" on pregnancy leaves, which requires that plaintiff submit to an examination by a school district-appointed physician and which reserves to the school district the final determination of the date for commencement of her leave. In this suit, brought as a class action, plaintiff attacks this "interim policy" and also attacks defendants' policy of refusing

to allow the use of accumulated sick pay during maternity leave. At this time plaintiff seeks a preliminary injunction prohibiting defendants from forcing her to take a leave of absence before the time she and her physician determine that this is necessary. If the court does not act, because of plaintiff's refusal to submit to examination by defendants' physician, she will be forced to begin a leave of absence on February 23, 1973.

The factors to be taken into consideration in weighing an application for a preliminary injunction are the relative importance of the rights asserted, the acts to be enjoined, the hardship that would result during the pendency of the action from granting or refusing to grant a preliminary injunction, the probability of ultimate success, and the public interest. *King v. Saddleback Junior College District*, 425 F.2d 426, 427 (9th Cir. 1970). Because, as discussed below, the act to be enjoined has generally been regarded as a violation of the equal protection clause and is a patent violation of the Equal Employment Opportunities Act, 42 U.S.C. § 2000e-2(a), the court concludes that all these factors would be promoted by granting a preliminary injunction: Plaintiff will be able to exercise the important rights granted in the Equal Employment Opportunities Act only if a preliminary injunction is granted, whereas granting it will only deny defendant an opportunity to act in contravention of the Act and the fundamental public policy behind it.

The question whether forced maternity leave unconstitutionally discriminates against women has gen-

erally been answered in the affirmative by the reported federal court decisions considering the issue, including a decision by Judge Harris of this court. *Green v. Waterford Board of Education,* 41 U.S.L.W. 2419 (2d Cir. Jan. 29, 1973); *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972); *Bravo v. Board of Education of the City of Chicago,* 345 F. Supp. 155 (N.D. Ill. 1972); *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Pocklington v. Duval County School District,* 345 F. Supp. 163 (M.D. Fla. 1972); *Robinson v. Rand,* 340 F. Supp. 37 (D. Colo. 1972); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *Doe v. Osteopathic Hosp. of Wichita,* 333 F. Supp. 1357 (D. Kan. 1971). One federal court, however, has held that such a regulation does not violate the equal protection clause. *Cohen v. Chesterfield County School Board,* 41 U.S.L.W. 2390 (4th Cir. Jan. 15, 1973) (en banc); a second federal court indicated in *dictum* that it did not believe such a regulation would violate the equal protection clause. *Schattman v. Texas Employment Comm'n,* 459 F. 2d 32 (5th Cir. 1972) (dictum).

Even though the present action is not brought pursuant to the Equal Employment Opportunities Act, the cases holding forced pregnancy leave to be sex discrimination are now supported by the Equal Employment Opportunities Act. Since the time of the events involved in the prior reported cases, Congress extended the Act to include public employers such as defendants. Pub. L. No. 92-261, § 2(2), 86 Stat. 103 (1972). Thus, defendants, like any employer, are

bound by 42 U.S.C. § 2000e-2, which forbids employers from discriminating on the basis of sex. The agency with enforcement responsibility for this statute, the EEOC, has interpreted this provision as requiring that:

> policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

This guideline is entitled to great deference. *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In view of defendants' failure to even suggest why it might not be valid, the court must accept this interpretation of the requirements of the Act. Although the EEOC's guidelines are not directly applicable to a suit brought pursuant to 42 U.S.C. § 1983, "they are helpful and persuasive in considering the . . . constitutional issue raised in cases . . . brought . . . against public agencies." *Western Addition Community Organization v. Alioto,* 340 F. Supp. 1351, 1353 n.1 (N.D. Cal. 1972); *see Castro v. Beecher,* 459 F.2d 725, 733 (1st Cir. 1972).

In view of this authority requiring that pregnancy not be treated differently than any other temporary disability, it is clear that the challenged forced-leave policy is invalid. First, pregnancy is the sole dis-

ability for which the district forces an employee to take a leave of absence even when the employee and attending physician do not deem it necessary. Second, only a person who is pregnant is forced to submit to an examination by the school district's doctor in order to continue working. The court therefore concludes that plaintiff is entitled to a preliminary injunction.

In her motion, plaintiff asked that the preliminary injunction encompass the entire class. The court has not yet determined that this is a proper action to be maintained as a class action, nor does it have sufficient information to even provisionally make that determination. Moreover, it does not appear that the class is so numerous that other persons affected by the policy could not simply intervene. Therefore, the preliminary injunction will encompass only the named plaintiff.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Ordered that defendants are hereby enjoined, pending the conclusion of this lawsuit, from terminating plaintiff's employment, requiring her to take a leave of absence, or otherwise enforcing against plaintiff any policy requiring her to take pregnancy leave of absence other than when deemed necessary by plaintiff and her physician.

Dated: February 22, 1973

Alfonso J. Zirpoli
United States District Judge

United States District Court
For the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc.,
Plaintiff,
vs.
Richmond Unified School District, et al.,
Defendants.

[Filed Jul. 30, 1973]

ORDER DENYING MOTION TO DISMISS

In this action plaintiff alleges that she was discriminated against in her employment on account of sex contrary to 42 U.S.C. § 1983 and the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. Since the suit was filed on February 5, 1973, there have been a series of motions and orders concerning the court's jurisdiction. In essence, the court previously ruled that it had jurisdiction pursuant to § 1983 to grant injunctive relief against the public-entity defendants and to grant both injunctive and monetary relief against defendant Snodgrass. This court also ruled that the 1964 Civil Rights Act was not a proper jurisdictional basis, because the plaintiff had not received a right-to-sue letter prior to commencing this suit as 42 U.S.C. § 2000e-5 appears to require. There-

after, plaintiff moved to file a supplement to her complaint to allege the receipt of a right-to-sue letter, and, over defendants' objection, the motion was granted. Defendants now move to dismiss the supplement to the complaint on the grounds that the complaint still states no claim under the Civil Rights Act of 1964. While this matter was pending, the Supreme Court decided *City of Kenosha v. Bruno,* 41 U.S. L.W. 4819 (S. Ct. June 11, 1973), and the Fifth Circuit decided *Drew v. Liberty Mut. Life Ins. Co.,* No. 72-3003 (5th Cir. June 4, 1973). In order to consider these decisions, the court goes beyond the present motion and totally reconsiders the jurisdictional bases of this suit.

1. *Jurisdiction pursuant to § 1983:*

The Supreme Court's decision in *City of Kenosha v. Bruno, supra,* rejects the theory that governmental entities can be sued pursuant to § 1983 for injunctive relief even though *Monroe v. Pape,* 365 U.S. 167 (1961), precludes suing them for damages. Thus, the court's prior ruling was erroneous. It is now clear that the complaint states a cause of action pursuant to § 1983 only as to defendant Snodgrass.

2. *Jurisdiction Pursuant to § 2000e-5 Prior to Supplement to Complaint:*

In *Drew v. Liberty Mut. Life Ins. Co., supra,* the Fifth Circuit carefully reviews the relevant statutes and their legislative history, and it concludes that a suit may be brought prior to the issuance of a right-to-sue letter when, as in the present case, temporary

injunctive relief is necessary pending the outcome of Equal Employment Opportunity Commission proceedings. The court is convinced that this is a proper interpretation of the applicable law. Therefore, the court has always had jurisdiction pursuant to § 2000e-5 to grant temporary injunctive relief. Until plaintiff filed a proper supplement to the complaint, however, it lacked jurisdiction over the claim for permanent injunctive relief and for damages.

3. *Jurisdiction Pursuant to § 2000e-5 Subsequent to Supplement to Complaint:*

Defendants' present motion questions whether the supplement to the complaint cures the lack of jurisdiction under § 2000e-5 to grant permanent relief. For the most part, the motion attacks plaintiff's failure to allege with particularity that each precise step in exhausting the administrative remedy was taken. Plaintiff, however, has given notice of her claim that she fulfilled the exhaustion requirement in a "short and plain statement," and this is all that is required. Fed. R. Civ. P. 8(a)(1). If some necessary step has been omitted, defendants should bring that fact before the court in some appropriate form and the court then can resolve the substantive matter rather than evaluating plaintiff's pleading ability.

Defendants also argue that plaintiff's supplement to the complaint is insufficient, because plaintiff failed to obtain a notice of right-to-sue prior to filing the initial complaint. This objection is based upon the argument that the court must have jurisdiction at the outset of a suit. As discussed, however, the

original complaint states a proper claim for injunctive and monetary relief against defendant Snodgrass and for temporary injunctive relief against the other defendants. After the claims were filed, a further cause of action accrued to plaintiff when the right-to-sue letter was issued. Plaintiff properly filed this new related claim as a supplemental claim in this lawsuit rather than filing a second lawsuit and moving for consolidation. To require a second filing by the aggrieved party after termination of the administrative proceeding would serve no purpose other than the creation of an additional procedural technicality. *Cf. Love v. Pullman,* 404 U.S. 522, 526 (1972).

It Is Therefore Ordered that the motion to dismiss is denied.

Dated: July 30, 1973

Alfonso J. Zirpoli,
United States District Judge

United States District Court
for the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc.,
Plaintiff,
vs.
Richmond Unified School District, et al.,
Defendants.

[Filed August 31, 1973]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DENYING IN PART AND GRANTING IN PART MOTION TO CERTIFY CLASS

Plaintiff, a school teacher, commenced this action when defendants threatened to require her to take a pregnancy leave of absence before she or her physician thought that it was necessary. On February 22, 1973, the court enjoined defendants from taking this action, and plaintiff continued to work until the day of her delivery. Plaintiff now seeks summary judgment and an order certifying this as a class action. Defendants have filed a cross-motion for summary judgment.

1. *Summary Judgment as to the Individual Claim:*

The essential basic facts are simple and are not disputed: Plaintiff became pregnant while employed

by the defendant school district. When it became clear that defendants would require her to cease working before she and her physician deemed it necessary and that she would not be permitted to use her accumulated sick leave while she was unable to work, plaintiff filed a charge with the E.E.O.C. In order to prevent defendants from requiring her to leave work while that charge was pending, plaintiff later commenced this suit and obtained a preliminary injunction. Thereafter, she was issued a right-to-sue letter by the E.E.O.C., and, as the court previously ruled, she properly supplemented her complaint to add the cause of action that this created.

The basic legal framework concerning plaintiff's Title VII claim is, similarly, simple. In 42 U.S.C. § 2000e-2(a), Title VII forbids discrimination by an employer against an employee on the basis of sex. Although initially Title VII was not applicable to governmental employers, in 1972 Congress amended the definition of "employer" in 42 U.S.C. § 2000e(b) and expanded the act to encompass discrimination by public employers such as defendant. Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972). An E.E.O.C. guideline interprets the statutory ban on sex discrimination as specifically requiring that:

> policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

29 C.F.R. § 1604.10(b). This is precisely what plaintiff asks that defendants do. Thus, the applicable substantive law, if this guideline is valid, supports plaintiff's motion. Defendants, however, argue that there are several reasons why they should prevail.

First, defendants argue that the E.E.O.C. guideline quoted above is invalid, because it was "promulgated without statutory authorization." This argument is based on the fact that 42 U.S.C. § 2000e-12 only authorizes the Commission to promulgate "procedural regulations." The Supreme Court, however, has already ruled that substantive guidelines issued by the E.E.O.C. are not only proper, but they are entitled to "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971). Next, defendants argue that the guidelines are not in accord with the statutory provisions of Title VII. The E.E.O.C. has determined that it is discrimination on the basis of sex when employers treat pregnancy disability other than as a temporary disability. In view of the total absence of any substantial showing why this is an arbitrary conclusion, the court must defer to the E.E.O.C.'s view.

Thirdly, defendants suggest that they can defend this action on the basis of various provisions of state law. Plainly Title VII, as properly interpreted by E.E.O.C. guidelines, supersedes any inconsistent provision of state law. *See* 42 U.S.C. § 2000e-7; *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1228 (5th Cir. 1972).

A three-judge court is not necessary in this case, because, among other reasons, such a court is not required when a state law is unconstitutional for the reason that it conflicts with superior federal law. *See Swift & Co. v. Wickham,* 382 U.S. 111 (1968).

Defendants' final argument is that the court lacks jurisdiction, because plaintiff did not properly exhaust her administrative remedies. Plaintiff unquestionably filed a charge before the E.E.O.C. which, like the complaint in this case, alleges that plaintiff was the victim of sexual discrimination in that defendants would require her to take forced pregnancy leave and would deny her use of accumulated sick leave. It is irrelevant that defendants changed their policy since that charge was filed, and now they would apply a different, but still illegal policy, regarding forced pregnancy leaves.

Based on the foregoing, the court concludes that plaintiff's motion for summary judgment must be granted on the basis of Title VII. Plaintiff also argues that her motion is supported by 42 U.S.C. § 1983. Because it is important to the class action motion, the court also considers this alternate claim.

As discussed in the court's previous order, the § 1983 claim is valid only as to defendant Snodgrass. Before he can be required to respond to plaintiff's claim for damages, it must be shown that he personally acted to violate her civil rights. *See Hesselgesser v. Reilly,* 440 F. 2d 901 (9th Cir. 1971). At the present time, this has not been proven. Therefore, summary judgment cannot be granted on the basis of this claim. Moreover, the question whether § 1983 is

violated by a forced-leave policy such as that involved here is presently pending before the Supreme Court. *See Cleveland Bd. of Education v. LaFleur* and *Cohen v. Chesterfield City School Bd.,* 41 U.S.L.W. 3569 (S. Ct. Apr. 23, 1973). Thus, even if the necessary facts were established, the court might deem it inadvisable to enter summary judgment at this time.

2. *Class Action Certification:*

Plaintiff seeks to have this action certified as a class action brought on behalf of all female employees of the defendant district who have been or will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees. Defendants argue that this is not an action properly maintainable as a class suit. The court agrees with defendants that retroactive class relief would be improper, but it believes that prospective class relief should be entered.

The reason that the court will not certify the action as to retroactive payment of benefits is that it does not appear that the number of persons involved is so large that joinder would be impracticable. *See* Fed. R. Civ. P. 23(a)(1). Most members of the proposed retroactive-benefits class could not present Title VII claims within the limitations period. *See Mather v. Western Air Lines, Inc.,* 42 U.S.L.W. 2005 (C.D. Cal. 1973). The number of persons with valid Title VII claims appears to be less than a dozen. While others might have valid § 1983 claims, the court does not believe that plaintiff, who can obtain relief pursuant to Title VII, is an appropriate representative of that

class. Additionally, the court agrees with defendant that plaintiff's claim, as presented throughout these proceedings, is typical only of persons affected by defendants' policy relating to permanent certified employees. This further reduces the size of the would-be class. Finally, each class member's claim would involve separate questions of fact regarding how long she was forced to take leave, how long she was medically unable to work, and how long she remained away from work for the sole purpose of caring for her new baby. Making these determinations retroactively would present such complex factual issues that it cannot be said that common issues of law and fact predominate as Rule 23(b)(3) requires.

A different case, however, is presented as to the class on whose behalf plaintiff seeks prospective relief. Such a group would encompass all of defendants' present and future female permanent certified employees who could become pregnant, a group so numerous that joinder would be impracticable. Since no damages are sought on behalf of this group, all questions of fact and law are identical. Thus, this class satisfies the requirements of Rule 23 and it will be certified.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Ordered that:

(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery;

(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

(5) plaintiff's attorney shall submit an itemized request for reasonable attorney's fees; and

(6) plaintiff shall submit a judgment in accordance with the foregoing and local rule 123.

Dated, August 31, 1973

Alfonso J. Zirpoli
United States District Judge

United States District Court
For the Northern District of California

No. C-73-0192 AJZ

Sonja Lynn Berg, etc., *Plaintiff,*

vs.

Richmond Unified School District, et al., *Defendants.*

[Filed Dec. 4, 1973]

JUDGMENT

The above-captioned matter came on regularly to be heard on the 20th day of August, 1973, before the Honorable Alfonso J. Zirpoli of the above-entitled court, pursuant to plaintiff's motions for summary judgment and to certify said action as a class action and pursuant to defendants' cross-motion for summary judgment. The court being fully advised in the premises, having reviewed all pleadings, papers and files on record the above-captioned matter, and the court having ordered that judgment be entered,

It Is Therefore Ordered, Adjudged and Decreed that:

(1) plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

(2) plaintiff's motion for class action certification is granted in part and denied in part; plaintiff is

designated as the representative of all female permanent certified employees of the defendant district who will be discriminated against on account of sex by the district's policies regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class;

(3) defendants, their agents, and successors are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery;

(4) defendants, their agents, and successors are permanently enjoined from adopting or enforcing policies or practices formal or informal, involving such matters as commencement and duration of leave, reinstatement, and payment under any health or temporary disability insurance or sick leave plan which apply to disability due to pregnancy or childbirth on different terms and conditions than they apply to other temporary disabilities;

(5) plaintiff's attorney shall be paid reasonable attorney's fees by defendants in the amount of $3,675.00;

(6) costs shall be awarded to plaintiff against defendants in accordance with plaintiff's memorandum of costs filed in accordance with Rule 124(e) of the Local Rules of this Court.

Dated, December 4, 1973

Alfonso J. Zirpoli,
United States District Judge

Appendix D

STATUTES INVOLVED

42 U.S.C. § 2000e - 2(a):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e - 5(b):

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent")

within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon

which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 2000e - 5(f)(1):

. . .

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under a subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action

may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

. . .

29 C.F.R. § 1604.10(b):

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

California Education Code § 13456:

The governing board of any school district shall provide for such leave of absence from duty as it deems appropriate for any female employee of the district who is employed in a position requiring certification qualifications and who is required to absent herself from her duties because of pregnancy or convalescence following childbirth, and shall adopt reasonable rules and

regulations prescribing the manner of proof of pregnancy, the point during the course of the pregnancy at which leave of absence shall be taken, and the length of time for which the leave of absence shall continue after birth of the child. Anything in Sections 13467 and 13469 to the contrary notwithstanding, the board may also provide in the rules and regulations whether leave granted under this section shall be with or without pay and, if with pay, the amount, if any, to be deducted from the salary due the employee for the period in which the absence occurs.

Nothing in this section shall be construed so as to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy.

The leave provided for in this section is in addition to any other leave provided for by law.

This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay.

California Education Code § 13456 (effective, January 1, 1976):

The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.

Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district.

Except as provided herein, written and unwritten employment policies and practices of any school district shall be applied to disability due to pregnancy or childbirth on the same terms and conditions applied to other temporary disabilities.

This section shall be construed as requiring the governing board of a school district to grant leave with pay only when it is necessary to do so in order that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury, or disability.

California Education Code § 13468:

Every person employed five days a week by a school district in a position requiring certification qualifications shall be entitled to 10 days' leave of absence for illness or injury and such additional days in addition thereto as the governing body may allow for illness or injury, exclusive of all days he is not required to render service to the district, with full pay for a school year of service. A certificated employee employed for less than five school days a week shall be entitled, for a school year of service, to that proportion of 10 days' leave of absence for illness or injury as the number of days he is employed per week bears to five and is entitled to such additional days in addi-

tion thereto as the governing board may allow for illness or injury to certificated employees employed for less than five school days a week; pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the school year. If such employee does not take the full amount of leave allowed in any school year under this section the amount not taken shall be accumulated from year to year with such additional days as the governing board may allow.

The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purposes of this section. Such rules and regulations shall not discriminate against evidence of treatment and the need therefor by the practice of the religion of any well-recognized church or denomination.

Nothing in this section shall be deemed to modify or repeal any provision of law contained in Article 3 of Chapter 6 of Division 3 of the Health and Safety Code.

The provisions of Section 13467 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any such employee five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board.

Appendix E

AFFIDAVIT OF MAXWELL THEBAUT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Maxwell Thebaut, being duly sworn, deposes and says:

1. I am a physician, licensed to practice medicine in the State of California. I am a specialist in the medical fields of obstetrics and gynecology, certified by the American Board of Obstetrics and Gynecology. I have practiced my medical specialty continuously since 1933 to the present excepting for four years during World War II. My offices are in Oakland, California.

2. I have been retained by the Richmond Unified School District to give my opinion respecting aspects of the employment of pregnant teachers during the late period of their pregnancy. In referring to "late pregnancy" I mean the six weeks prior to an estimated date of delivery.

3. In giving my opinion I have taken into account the following specific factors in addition to my experience, medical knowledge and general knowledge respecting schools and teachers:

a. That a teacher is usually required to maintain control and direction of approximately 30 active students.

b. That a teacher is usually required to remain with her class for periods of up to one hour without interruption.

c. That a teacher usually undergoes jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d. That a teacher is usually required to supervise student games and sports.

e. That a teacher is usually required to cope with minor emergency situations including but not limited to student fights, accidents, and illnesses.

4. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies. Common emergencies are:

a. placenta previa: sudden onset of severe bleeding;

b. placenta abruptio: premature separation of the placenta from the uterine wall;

c. rupture through the scar of previous caesarean operation;

d. breaking of the bag of water.

Emergencies of the kind described above commonly occur in up to 20% of all pregnancies, cannot be anticipated, are disabling, and require prompt medical attention.

5. In my opinion a teacher in late pregnancy is likely to be temporarily disabled or required to leave her class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies, some of which are:

a) urination—In virtually all pregnancies frequent and uncontrollable urination is required as a result of pressure by the foetus on the bladder.

b) incontinency—In approximately half of all pregnancies, incontinency is present or may be precipitated by sneezing, coughing, jumping, or like stresses.

c) false labor—In somewhat less than half of all pregnancies false labor occurs in the last month prior to delivery.

d) true labor—In all pregnancies, the time when true labor will begin cannot be predetermined absent induction of labor.

6. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her foetus:

a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises;

b. When she is required to supervise student games and sports;

and that such risk is greatly increased when such jostling and bumping or games and sports take place on stairways.

These risks exist because a woman in late pregnancy suffers an abnormal distribution of her body weight. As a result, women in late pregnancy are often awkward and uncertain when standing or walking. These

problems are magnified if inappropriate footwear is worn. Women in late pregnancy are peculiarly vulnerable to even modest elements of jostling and bumping that commonly occur in the movements of crowds of people and in the course of games and sports. Any of the conditions heretofore described could be precipitated by such jostling, bumping, or falling incident thereto.

7. In my opinion a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses.

The physical awkwardness that is present in late pregnancy will in most cases make it difficult for a teacher to respond in situations calling for sudden movement and exertion. Urination or incontinency could easily be precipitated by actions, such as bending or lifting, that she might be required to take. A teacher could easily become so disabled by her own movements or a minor blow, that she would be helpless to take any effective action.

8. It is my opinion that with respect to virtually all pregnancies an exact predictive date for delivery cannot be determined. Among the factors creating uncertainty with respect to the date of delivery are the following:

a) The term of a normal pregnancy is variable within a range of from 260 to 300 days from conception.

b) The date of conception is rarely ascertainable.

9. It is common practice in the medical profession to estimate a delivery date based upon Nagle's rule (266 days from conception) and an estimated date of conception. It is commonly recognized in the medical profession that such estimated dates are not exact and that delivery can be expected at any time from two weeks before to two weeks after a date so calculated.

10. In my opinion, considering a teacher of average stamina, health and normal pregnancy; a rule requiring her to stop working at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery.

11. In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology.

12. In the medical profession it is recognized that normal pregnancy is a natural condition and not an illness resulting from any injury, infection, malfunction or disfunction of the body.

13. It is my opinion that more than 85% of all deliveries are the result of voluntary pregnancies and that the proportion of voluntary pregnancies is increasing.

/s/ Maxwell Thebaut, M.D. (CR 50-54)

RICHMOND UNIFIED SCHOOL DISTRICT
INTERIM MATERNITY LEAVE POLICY

Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the foetus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.

Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement. (CR 45-46)

APPENDIX

Supreme Court, U. S.
FILED
MAR 10 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

VS.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari Filed January 28, 1976
Certiorari Granted January 25, 1977

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APPENDIX

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Respondent.

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Petition for Writ of Certiorari Filed January 28, 1976
Certiorari Granted January 25, 1977

DOCKET ENTRIES

1973

Feb. 5—1. Filed Complaint, Iss summons.

Feb. 5—3. Filed Deft's argument opposing Granting of TRO.

Feb. 5—4. Filed Affidavit of Sam Teese.

Feb. 8—6. Filed Not of mo for prelim. inj., set for 2-22-73.

Feb. 8—7. Filed Mo for Prelim. inj.

Feb. 20—10. Filed Defts. Opposition to Mo. for Preliminary Injunction & Points & Authorities

Feb. 20—11. Filed Memo. of Points & Authorities in Support of TRO & of Motion for Preliminary Injunction

Feb. 22—13. Filed Ord granting Mo for prelim inj. AJZ
ORD: Pltff's mo for prelim inj—granted. AZ

Mar. 16—15. Filed Pltff's supplemental Memo regarding jurisdiction.

Mar. 22—16. Filed Not of mo & mos to dismiss; set for 4-16-73.

Apr. 3—17. Filed Statement in opposition to mo to dismiss.

Apr. 11—19a. Filed Deft's Reply Pts & Auths. in supp of mos to dismiss.

Apr. 16—ORD: Pltff's mo to certify Class action—denied.

Deft's mo to dismiss—denied.
Deft's mo to stay—denied. AJZ

Apr. 23—20. Filed Pltff's amended Complt.

Apr. 23—21. Filed Pltff's Not of Mo & mo to file supplmt to complt.

Apr. 23—22. Filed Pltff's Not of appl & appl for correction of orders.

Apr. 30—24. Filed Deft's Order denying Mo to approve class Action. AJZ

May 1—25. Filed Deft's Orders on Mos to Dismiss, All Mos of Richmond Unified School Dist. to Dismiss—denied.

May 9—27. Filed ANSWER AND DEMAND FOR TRIAL BY JURY by Deft. Richmond Unified School Dist.

May 9—28. Filed Defts. Richmond Oppo. to Mo. to File Suppl to Compl.

May 14—29. Filed Stipu. to correct Orders issued on 4/16/73.

May 14—30. Filed ORDER Granting Mo. to Dismiss without prejudice to pltf. AJZ
ORDERED Pltfs. Mo. to File Suppl. Compl. GRANTED AJZ

May 24—31. Filed No. of Mos. & Mos to Dismiss, 6/18/73, 1:30 PM

May 25— Lodged Order on Mo. to Supplement Complaint

June 7—32. Filed ORDER on Mo. to Supplement Compl. GRANTED AJZ

June 7—33. Filed Supplement to Complaint

June 8—34. Filed Pltfs. Statement in Oppo. to Mos. to Dismiss Civil Action

June 18— ORDERED Pltfs. Mo. to Dismiss DENIED . . . Court will file memo. opinion AJZ

July 20—35. Filed No. of Mo. & Mo. for Summ Judgt. 8/13/73, 1:30 PM . . . Statement in Support of Mo. for Summary Judgment . . . Memo. of Points & Auth. in Support of Summ Judgt.

July 30—37. Filed ORDER Denying Mo. to Dismiss

Aug. 13—39. Filed Defts. Statement on Issues of Material Facts; Cross Mo. for Summ Judgt; Afft. of F. Larson, S. Marchesi, Points; & auth in oppo. to Pltfs. Mo. for Summ Judgt.

Aug. 15—42. Filed Memo. of Points & Auth. in Oppo. to Defts. Mo. for Summ Judgt.

Aug. 20— ORDERED Pltfs. Mo. for Summ Judgt GRANTED in part . . . Defts. Mo. for Summ Judgmt denied . . . Court will file memo. opinion & Pltf. to submit form of judgt. AJZ

Aug. 31—43. Filed Order granting Mo for summary Judgt for Pltff. & Defts Mo for summ Judgt Denied, Pltffs Mo for Class action Granted in Part & denied in Part, Defts are permanently enjoined from denying accumulated sick leave for the period she was unable to work because of effect of pregnancy. Pltffs atty shall submit itemized request for attys fees, Pltffs atty to prepare order. AJZ

Oct. 5—47. Filed notice of appeal by the Defts, (Filed Untimely) Made and mailed notice to Counsel

Oct. 5—48. Filed Bond for costs on appeal ($250.00)

Dec. 5—50. Entered Judgment, Filed Dec 4, 1973 that Pltf's mo for sum judg't is granted and defts' mo for sum judg't is denied; Pltf Mo for Class action certification is granted in part and denied in part; & etc. AJZ

Dec. 13— Made and mailed notice of judgment to counsel of record.

1974

Jan. 2—52. Filed notice of appeal by the Defts. made and mailed notice to counsel of record & CCA.

Jan. 28—53. Filed Reporter's Transcript.

Jan. 10—54. Filed Designation of the record on appeal.

Jan. 10—55. Filed Order for preparation of reporter's transcript.

Jan. 30— Made and mailed record to 9th CCA.

In the United States District Court
Northern District of California

C-73-0192 AJZ

Sonja Lynn Berg, individually and on behalf of all other female employees of the Richmond Unified School District,
Plaintiff,

vs.

Richmond Unified School District, Richmond Board of Education, and W. W. Snodgrass,
Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff alleges:

I.

This action arises under 42 U.S.C. sections 1981 and 1983, under the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. 2000e et seq., known as the Civil Rights Act of 1964. Jurisdiction of this Court is invoked pursuant to sections 1331 and 1343(3) of Title 28 of the U.S. Code, and pursuant to section 2000(e)-5(f) of Title 42 of the U.S. Code, respectively.

II.

At all times mentioned herein, plaintiff Sonja Lynn Berg was and is a resident and citizen of the United States and of the City of Pinole, County of Contra Costa, State of California, and was and is a female person employed by defendant Richmond Unified School District ("District") as a teacher.

III.

Plaintiff brings this action on behalf of herself and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of all other female employees of the defendant District who have been or who will be discriminated against on account of sex by the District's policies regarding maternity leave and accrued sick pay benefits to pregnant employees. Said policies, the terms of which are set forth more fully hereinafter, require a female employee who is pregnant to take a compulsory leave at a time and for a period in the sole discretion of defendants, and said policies furthermore refuse sick pay or any other compensation to that female employee during the entire period of compulsory maternity leave. The class of female employees affected by said policies is so numerous that joinder of all members of that class is impracticable. Because the said policies of defendants deny to all members of the class the equal protection of the laws, and because the said policies violate the rights of all members of the class as defined under Title VII of the Civil Rights Act of 1964, there are questions of law and fact in common among all members of the class. The claims of plaintiff, Sonja Lynn

Berg, typify the claims of all members of the class, and plaintiff, Sonja Lynn Berg, will fully and fairly represent the interest of said class.

IV.

At all times mentioned herein, defendant Richmond Unified School District was and is the duly constituted governmental entity responsible for the operation of the primary and secondary public school system of the City of Richmond, County of Contra Costa.

V.

At all times mentioned herein, defendant Richmond Board of Education ("Board") was and is the duly organized and appointed body vested with overall responsibility for the primary and secondary public school system of defendant District. Defendant W. W. Snodgrass is the Superintendent of the defendant District and is its chief executive officer, who is charged with enforcement of District policy, and defendant W. W. Snodgrass is sued herein in his official capacity.

VI.

At all times mentioned herein, each defendant was and is acting as the agent of each other defendant, and each did the acts complained of herein in the course and scope of his employment.

VII.

Plaintiff is informed and believes and on that basis alleges that, at all times mentioned herein, defendants,

and each of them, acting under color of state law, promulgated, caused to be promulgated or enforced the leave regulations of the Richmond Unified School District, section 131.10 of which governs "maternity and paternity leaves", a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference. Section 131.10 compels leave of a pregnant employee to commence upon or before the first day of the seventh month of pregnancy, and further requires a minimum of thirty (30) days notice by the pregnant employee of intent to return to work. Section 131.10 further allows an optional day of paternity leave with full pay to the father who chooses to take such leave.

VIII.

Plaintiff is informed and believes and on that basis alleges that, at all times mentioned herein, defendants, and each of them, acting under color of state law, promulgated, caused to be promulgated or enforced an unwritten policy of defendant District, which disallows the use of accumulated sick pay by an employee for or during her maternity leave.

IX.

Plaintiff is informed and believes, and on that basis alleges, that on November 29, 1972, defendant Board met, and defendant W. W. Snodgrass proposed at that meeting that defendant Board adopt an interim maternity leave policy that would allow consideration of case-by-case exceptions of individual pregnant employees to the seventh month mandatory leave policy

of defendant District embodied in Regulation section 131.10 of defendant's leave regulations. This proposal was recorded in the minutes of the meeting of defendant Board, a copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference. According to the said minutes of that meeting of November 29, 1972, the matter of interim maternity policy was then tabled. On December 13, 1972, defendant Board voted to approve the interim maternity leave policy proposed on November 29, 1972, in minutes recorded and attached hereto as Exhibit "C", incorporated herein by reference.

X.

At all times mentioned herein, plaintiff was and is a female employee of defendant District. On or about December 14, 1972, plaintiff filed a request for maternity leave, indicating that her date of confinement was expected to be March 24, 1973. On or about December 20, 1972, plaintiff notified defendants, and each of them, in writing, that she did not wish to be compelled to take maternity leave prior to March 23, 1973, and that her doctor agreed to that extension from the arbitrary leave period in her case. A copy of said written notification by plaintiff is attached hereto as Exhibit "D" and is incorporated herein by reference. On or about December 6, 1972, plaintiff's physician, Dr. Robert Tomfohrde, wrote a letter, sent to Mr. Sam Teese, Assistant Superintendent of Personnel of defendant District, which letter indicated that plaintiff could work until the date of her confinement, on or about March 24, 1973. A copy of said

letter from Dr. Tomfohrde is attached hereto as Exhibit "E" and is incorporated herein by reference.

XI.

In or about the first week of January, 1973, plaintiff's attorney sent copies of an affidavit of Dr. Robert Tomfohrde, plaintiff's physician, to defendants, which affidavit stated under notarization that there was no contraindication for plaintiff, Sonja Lynn Berg, to continue work as a teacher until March 24, 1973. A copy of that affidavit is attached hereto as Exhibit "F" and is incorporated herein by reference.

XII.

On or about December 27, 1972, plaintiff received a letter from Mr. Sam Teese, Assistant Superintendent of Personnel of defendant District, a copy of which is attached hereto as Exhibit "G" and is incorporated herein by reference. In that letter, defendants, and each of them, refused to take account of the medical advice of plaintiff's doctor as to the proper time for her maternity leave, and required that plaintiff submit to examination by a District-appointed physician in order to have her pre-leave period extended to the date recommended by herself and her doctor. On or about January 10, 1973, plaintiff's attorney informed defendants, and each of them, in writing, of plaintiff's refusal to comply with their requirements for maternity leave set out in their letter to plaintiff of December 27, 1972, which is Exhibit "G" herein, to wit., requiring that plaintiff gain approval of a District-appointed physician for

the possible extension of plaintiff's pre-leave teaching period to March 24, 1973. A copy of said letter from plaintiff's attorney to defendants is attached hereto as Exhibit "H" and is incorporated herein by reference.

XIII.

The interim leave policy of defendants, adopted on December 13, 1972 and described in Exhibit "B" of this Complaint, discriminates against plaintiff because of her sex, in violation of the Fourteenth Amendment to the United States Constitution and in violation of sections 1981 and 1983 of Title 42 of the United States Code, in that said interim leave policy arbitrarily and capriciously singles out pregnancy, a condition unique to females, and treats pregnant female employees differently than employees with other illnesses or physiological conditions are treated. By the express reference of the said interim maternity leave policy to the seventh month leave line drawn in defendants' original leave Regulation 131.10, the arbitrary operation of the seventh month leave date is sustained in the interim policy.

XIV.

The requirement of defendants, and of each of them, as delineated in Exhibit "G" of this Complaint, that plaintiff gain and show approval of a District-appointed physician for a pre-leave extension beyond the arbitrary leave date referred to in defendants' interim policy, arbitrarily and capriciously operates against plaintiff, in that it treats

plaintiff differently from employees requesting leaves pursuant to medical conditions other than pregnancy.

XV.

The unwritten policy of defendants, and of each of them, which denies the utilization of accrued sick pay benefits to plaintiff and to all other pregnant female employees similarly situated, constitutes a violation of the Fourteenth Amendment rights of plaintiff and of the class she represents by denial of equal protection of the laws to this class of females, and said policy of denial of sick pay accruals to pregnant females upon leave violates Title VII of the Civil Rights Act of 1964, which has been amended to implement the prohibitions against sex discrimination as against governmental entities such as defendants herein.

XVI.

Unless restrained by this Court, defendants, and each of them, will implement these policies, and will terminate plaintiff, without pay and without allowing her to use her accumulated sick pay benefits, on February 24, 1973, thereby causing irreparable harm to plaintiff. There is no adequate remedy by law herein because plaintiff will be terminated before her claim can be adjudicated. There is substantial reason to believe that plaintiff will prevail on the merits of this action. The granting of a preliminary injunction restraining defendants, and each of them, from terminating plaintiff on February 24, 1973, or from otherwise applying the maternity leave and sick pay

exclusion to plaintiff or to any other member of the class represented by plaintiff in this action, will preserve the status quo until the constitutionality and legality of defendants' policies and practices at issue herein can be adjudicated. Therefore, plaintiff requests that a preliminary injunction be granted, restraining defendants, and each of them, from implementing defendants' maternity leave policy and terminating plaintiff or any other member of the class she represents, and restraining defendants, and each of them, from denying to plaintiff or to any other member of the class she represents the full benefit of accumulated sick leave pay during the period of delivery, confinement and recuperation of plaintiff or other member of the affected class. Said injunction should be made permanent after a trial of this action upon its merits. Because of the considerable likelihood of irreparable harm to plaintiff and to other members of the class she represents, if defendants or any of them should implement the maternity leave and sick pay exclusion policies of defendants, plaintiff requests that a temporary restraining order be granted by this Court, restraining defendants, and each of them, from any such implementation of these policies until plaintiff's motion for a preliminary injunction is heard and decided.

XVII.

Because of said discriminatory policies and practices of defendants, and of each of them, plaintiff and other members of the class she represents have suffered or will suffer damages, including but not

limited to loss of wages and sick leave benefits, in an amount presently unascertainable. Plaintiff prays leave of this Court to amend this Complaint to plead the exact amount of damages suffered once this amount has been ascertained according to proof at trial upon this action.

Wherefore, plaintiff prays:

1. For a temporary restraining order pending hearing on plaintiff's motion for a preliminary injunction;

2. For a preliminary injunction;

3. For a permanent injunction;

4. For damages according to proof;

5. For costs of suit incurred herein, including attorney's fees;

6. For such other relief as this Court may deem meet and proper.

Dated, January 25, 1973

Respectfully submitted,
Equal Rights Advocates:
Davis, Dunlap & Williams
San Francisco, California
By: Mary Cynthia Dunlap
Attorney for Plaintiff

VERIFICATION

State of California
City of Berkeley, County of Alameda } ss.

Sonja Lynn Berg, being duly sworn, deposes and says:

That she is plaintiff herein.

That she has read the foregoing Complaint and knows the contents thereof and that the same are true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, she believes them to be true.

Sonja Lynn Berg

Exhibit "A"

Section 131.10 Maternity and Paternity Leaves

1. In all cases of expected maternity of a permanent certificated employee, the employee must secure an extended leave of absence. This leave must become effective no later than the start of the seventh month of pregnancy.
2. Maternity leave may be terminated by the individual teacher by presenting a statement from a physician that the individual is physically and mentally able to resume teaching. The certificated employee shall give a minimum of 30 days notice of intent to return.
3. In case of adoption of an infant, the mother will be allowed maternity leave if she requests such leave.
4. Paternity leave of one (1) day may be granted the male employee without loss of pay during or immediately after the confinement of his wife. In cases of adoption of an infant, the same regulations will apply as in the case of a natural birth.

* * *

Exhibit "B"

MINUTES
RICHMOND UNIFIED SCHOOL DISTRICT
Regular Board Meeting
November 29, 1972—7:30 p.m.
Gymnasium—Helms Junior High School

4. *Maternity Leave, Interim Revision.*
Dr. Snodgrass stated that maternity leave currently is being discussed with the district's Certificated Employee Council. The position of the district has been to delay action on this item until the County Counsel has responded to a request for appropriate updating of current district policy. The County Counsel has asked for additional time to research the entire subject.

The superintendent said that current district policy mandates that maternity leaves become effective no later than the start of the seventh month of pregnancy. He said that several court cases across the United States have concluded that determination of the starting date for maternity leave is a matter to be determined between the employee and her physician. Some California school districts have adopted such a policy.

Pending completion of discussion with the Certificated Council, Dr. Snodgrass requested that interim board action to consider individually employee rquests to work beyond the start of the seventh month of pregnancy. In addition, the super-

intendent said this is an issue across the nation and that there are constitutional issues involved. He said the district's materials on this subject have been sent to the County Counsel, and that eventually the County Counsel will put together a leave policy for consideration. In the final policy, the district would recommend that the time for leave be determined from discussions with the individual, the medical doctor and district personnel. Today's request, said the superintendent, is an interim request and he feels it is the most equitable approach to the problem.

Mr. Gay said the district carries workman's compensation, and he believes the district should attempt to determine how the workman's compensation insurance people feel about pregnant teachers working past the seventh month of pregnancy. He wondered what statistics might show on injuries because of such work, and asked that the matter of the interim change be held over to the board's next meeting.

Sam Teese, Assistant Superintendent, Personnel, said he believes Mr. Gay's point is well taken. The basic reason behind the beginning of maternity leave at the start of the seventh month, he said, was to protect school districts from lawsuits that might evolve from injuries to teachers. He said he does not believe there would be any valid statistics on injuries because almost all districts in the nation have had the same policy. Again, he emphasized that this was an interim request, and it

would be up to the district to see that no accidents took place.

It was moved by Mr. Bartels, seconded by Mr. Jageman, that the board permit the district to consider individually employee requests to work beyond the seventh month of pregnancy.

Mr. Jageman asked how long the interim period might be, and Dr. Snodgrass replied hopefully from six weeks to two months. Mr. Teese said the extension of leave would be up to the medical doctor in charge of the teacher, and would be somewhere between 30 to 45 days. Mr. Jageman asked who would make that determination, and Mr. Teese replied that the district would check with the doctor, but the final decision would be the district's. The first priority, he said, would be the welfare of the children. He said he would prefer to have leaves begin at the end of [illegible]educational unit, at the end of a quarter, or at the end of a semester break, and there has been little disagreement with employees in the past in taking their leaves at such times.

Mr. Gay asked how many teachers object to the present maternity leave requirement, and Mr. Teese said that during 1971-72 thirty-six maternity leaves were granted. Of that number a significant number did not return to work. He said annually the district is faced with some 30 to 35 maternity leaves. Dr. Snodgrass added that only in recent months had teachers objected to the present requirements because of the publicity given

to court cases. Mr. Teese said a significant number have not objected to the policy on merit, but some have on financial grounds, and some on the continuity of the educational program. In answer to a question from Mr. Gay, Mr. Teese said that maternity leaves on the interim policy would come through consultation also with the principal and teacher and the decision would be made that would benefit the educational program. Mr. Teese noted in discussion with Mr. Gay that the percentage of requests for maternity leaves are much higher on the elementary level than on the secondary level. Mr. Shattuck asked if the reason for the request for the interim change in policy is because of litigation in which the local district may become involved. Dr. Snodgrass replied that was correct, and the basis for the suits filed to date is that no individual consideration is given. Mr. Fuller said he had not intended to vote on this item but he does not wish it to be defeated at this time so he would call for tabling the matter of the interim change in maternity leave policy.

The vote on the motion to table was as follows: YES—Mr. Fuller, Mr. Gay, Mr. Shattuck. No—Mr. Bartels, Mr. Jageman. Absent—None. The item was ordered tabled.

Exhibit "C"

MINUTES
RICHMOND UNIFIED SCHOOL DISTRICT
Regular Board Meeting
December 13, 1972—7:30 p.m.
Gymnasium—Helms Junior High School

3. ***Maternity Leave Proposal, Action to Remove from Table.***

Dr. Snodgrass said that at the last board meeting a change in the maternity leave policy was prepared that would not mandate a leave at the end of six months of pregnancy. He said this would have been an interim change that would be in effect only until the final policy has been checked by the County Counsel's Office. Under the interim policy, he said, the district and the individual teacher would determine when the maternity leave would start. He said the item was tabled at the last meeting, but that a member of the board has asked that it be placed on the agenda for this meeting so that it can be removed from the table.

It was moved by Mr. Gay, seconded by Mr. Bartels, that the matter of an interim maternity leave policy be removed from the table.

Mr. Shattuck said a motion to remove from the table is not debatable and called for a vote.

Mr. Gay's motion, seconded by Mr. Bartels, to remove the matter of the interim maternity

leave from the table was approved. VOTE: Yes —Mr. Bartels, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—Mr. Fuller. Absent—None.

Mr. Shattuck said he would now hear discussion on the item itself.

Mr. Bartels moved to adopt the interim maternity leave policy, as presented by Dr. Snodgrass, at the board's previous meeting. Mr. Jageman asked for clarification of the motion.

Mr. Bartels said that for clarification he would refer to the interim maternity leave proposal, as recommended by Dr. Snodgrass, at the November 29 board meeting. Mr. Jageman seconded the motion.

Mr. Gay asked how long the interim policy would be in effect, and the superintendent said he would expect it to remain in effect for six weeks to two months.

Mr. Fuller said he would like to amend the motion as it only pertains to certificated employees which is discriminatory.

Mr. Fuller then moved to amend the motion so that it would include classified employees. His amendment was seconded by Mr. Gay.

Mr. Jageman asked if there was any reason why the proposal applied only to certificated employees, and Dr. Snodgrass replied there was none, as maternity leave is the same for both classes of employees. Mr. Fuller responded that the proposal never mentioned any other than certificated em-

ployees and he wants to be sure that it will include classified employees. Mr. Shattuck expressed agreement with Mr. Fuller.

Henry Clarke, representing Public Employees Union Local No. 1, thanked Mr. Fuller for the amendment although, he added, the administration did explain to classified groups that there would be one policy. Mr. Shattuck agreed that he believes there will be one policy but it is just as well to have the policy clarified.

Mr. Fuller's amendment, seconded by Mr. Gay, to include classified employees in the interim change on maternity leave proposal was approved. VOTE: Yes—Mr. Bartels, Mr. Fuller, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—None. Absent—None.

Mr. Fuller said that although he is against discrimination in employment, he still believes the proposal is ill-advised. He said he thinks leave at the end of six months of pregnancy is proper and he would wish to deviate from such a policy only if there are obvious educational benefits to pupils. For example, he said, if there is one month until the end of the semester the teacher should remain with the class if she is able to. He said he does not believe it is in the best interest of the school district to permit teachers to teach until the time the baby is due.

Mr. Shattuck said he does not believe the district necessarily wishes to permit teachers who are pregnant to teach any longer than they do now. He said he finds

that the policies do not differ between married and unmarried teachers who might be pregnant, and he believes this could present a difficult situation for the school district.

Mr. Gay said he would support the interim policy, and believes that the board and the district should give credence to a doctor's advice. He said it must be presumed that teachers who are pregnant are receiving good medical advice, and for that reason he would favor the interim motion.

Mary Moore, a district resident, said that she is employed at Hunt's Products in Oakland where women work a 10-hour day, 6 days a week, and if they are pregnant they are allowed to work as long as they are able to.

Mr. Shattuck thanked Mrs. Moore for her comments and said, however, everyone should realize the board must be concerned with educational results.

Mr. Bartels' motion, seconded by Mr. Jageman, to approve the interim maternity leave policy, as recommended by Dr. Snodgrass at the November 29 meeting, was approved. VOTE: Yes—Mr. Bartels, Mr. Gay, Mr. Jageman, Mr. Shattuck. No—Mr. Fuller. Absent—None.

Exhibit "D"

December 20, 1972

Mr. Sam Teese
Assistant Superintendent, Personnel Services
Richmond Unified School District
1108 Bissell Avenue
Richmond, California

Dear Mr. Teese:

I am sending this letter to request an extension of my maternity leave from February 23 to March 23. As a result of the December 13 School Board Meeting, which adopted an interim maternity leave policy, I have been informed by my principal that my maternity leave must commence February 23. This is thirty days before the expected date of confinement. My doctor feels there is no (physical or mental) reason why I cannot work until this time. The early enforced leave along with the exclusion of my accrued sick leave benefits during leave poses a financial burden on my family.

I am therefore asking that I be allowed to work until my doctor and I feel it is necessary for me to initiate my leave of absence. Thank you for your help and consideration in this matter.

Sincerely yours,
Sonja Berg

Exhibit "E"

Robert F. Tomfohrde, M.D.
2510 Webster Street
Berkeley, California 94705
849-1287

December 6, 1972

To Whom It May Concern:

R E: Berg, Sonja Lynn

Mrs. Berg's estimated date of confinement is March 24, 1973.

Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973.

If there is any additional information you need, please contact this office.

R. F. Tomfohrde, M.D.

Exhibit "F"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE

Dr. Robert Tomfohrde, being duly sworn, deposes and says:

I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973.

Dated: Dec 21, 1972

Dr. Robert Tomfohrde,
M. D.

(Jurat om tted)

Exhibit "G"

Richmond Unified School District
December 27, 1972

Mrs. Sonja Berg
2559 Francis Drive
Pinole, California 94564

Dear Mrs. Berg:

Out of concern for District liability and effectiveness of the educational program, we would prefer to involve a District appointed physician in any decision related to extension of your maternity leave to one day prior to date of confinement.

Should a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration.

We shall be pleased to process, on receipt, your request to see a District physician.

Sincerely,
Sam Teese
Assistant Superintendent
of Personnel

Exhibit "H"

Mary C. Dunlap,
Attorney at law
2020 Cedar Street #6
Berkeley, California
94709
Telephone:
(415) 8416553

To: Mr. Sam Teese
Assistant Superintendent of Personnel
Richmond Unified School District
1108 Bissell Avenue
Richmond, California 94802

Dear Sir,

I am writing to you on behalf of my client, Mrs. Sonja Berg. I am serving as counsel to Mrs. Berg in her dispute with the Richmond School District and its agents respecting the District's maternity leave and accrued sick pay policies. Mrs. Berg has asked my opinion about the advisability of submitting herself to the medical examination offered to her by a letter from you dated December 27, 1972 (hereinafter, the "letter"). It is my opinion, rendered in accordance with all applicable law on the subject, that the terms and conditions of the medical examination offered to Mrs. Berg by the letter are unlawful, because they constitute an enhancement of the invalid discrimination against females accomplished by the Richmond District's 30-day leave policy for pregnancy.

The reasons for my opinion are as follows:

1.) Mrs. Berg's own attending physician, Dr. Robert Tomfohrde, has indicated to the District in

writing that Mrs. Berg will be medically able to continue teaching until March 24, 1973, the date of her expected confinement for delivery. Dr. Tomfohrde has furthermore sworn an affidavit to that effect, a copy of which is enclosed hereinafter.

2.) There is absolutely no evidence that Dr. Tomfohrde's medical judgment is somehow untrustworthy or impaired. Also, Dr. Tomfohrde is the doctor under whose care Mrs. Berg has been and will continue to be during the pendency of her pregnancy, and is therefore highly familiar with her medical condition. Without any question of Dr. Tomfohrde's competence to determine whether Mrs. Berg may continue to work until March 24, 1973, the requirement that Mrs. Berg gain the assent of a District appointed physician to the extension of the pre-leave period beyond the arbitrary 30-day line amounts to an unnecessary and unreasonable restraint upon her right to continue work until or unless it is shown that her pregnancy is interfering with the effectiveness of the educational program or is exposing the District to untoward risks of liability to her, caused by her pregnancy.

3.) There can be little legal question that the District's mandatory leave policy violates applicable current principles on point. *See* Williams v. San Francisco Unified School District et al., 340 F. Supp. 438 (N.D. Cal. 1972).

The illegality of the District's maternity leave policy is not ameliorated by the proposed possibility of an exception for Mrs. Berg, qualified by the terms of the letter to her on the subject. Rather, by the requirement that Mrs. Berg permit herself to be examined by a "District appointed" physician, despite the fact that the medical judgment of her own physician establishes that she should not be subjected to the arbitrary 30-day leave requirement, the original discrimination of the 30-day line has been multiplied in her case. In the case of *Williams* cited above and in other recent federal decisions, the offensive part of mandatory maternity leave policies has been found to lie in the tendency of such policies to create invidious categories based upon sex; the requirement of a medical examination for pregnant females, or at least for Mrs. Berg, prerequisite to her receiving an extension of the arbitrary leave line, creates precisely such an invidious category.

4.) Counsel for Mrs. Berg recognizes and understands the significance of the District's interest in avoiding untoward liability in tort to pregnant employees, and in the continuity and functioning of the educational program. However, it has already been determined as a matter of law that these interests cannot support any maternity leave policy that fails to treat maternity on a case-by-case basis and that fails

to avoid sex discrimination in the manner of that treatment. In the situation at hand, the District's requirement that Mrs. Berg gain approval of a District appointed physician runs roughshod over the evidence now available to the District as to her individual case, to wit, that her own doctor has found her fit to continue teaching until March 24, 1973.

5.) The letter to Mrs. Berg claims a right on the part of the District to put her on leave despite its chosen physician's determination that she is fit to continue, if "liability or educational program become a consideration". Under the law, the District has no such generalized right, and Mrs. Berg is not about to create such a right by agreeing to the terms of the District's proposal stated in the letter.

Neither Mrs. Berg nor counsel for her wish to be unhelpful about resolving this dispute. However, the resolution proposed by the letter of December 27, 1972, amounts to a heightening of the legal objections of Mrs. Berg to the treatment of her pregnancy by the District. Even were the District to agree to free Mrs. Berg from its arbitrary 30-day policy, without its physician's examination as proposed, Mrs. Berg would remain dissatisfied and legally wronged. Mrs. Berg is unwilling to accept any settlement of this matter that fails to replace current pregnancy policies of the District with policies that are legal and that do not discriminate invidiously on account of sex. If the District through the Board or otherwise is unwilling to alter its maternity leave and accrued

sick pay policies to comport with applicable federal anti-discrimination law and with the U.S. Constitution, Mrs. Berg is prepared to litigate these issues as plaintiff in a class action, entitled on the caption of the enclosed affidavit, against the District, Board and Superintendent.

I am willing to meet with legal representatives of the District to determine whether a settlement in the above terms can be accomplished. However, because of the urgency of Mrs. Berg's legal situation with respect to the gaining of proper orders restraining enforcement of the mandatory leave policy, if necessary, any such meeting will have to be arranged and held promptly. I would suggest that if such a meeting is to transpire, it should transpire by the middle of January; otherwise, unless Mrs. Berg receives proper assurance that the Ditrict will change its leave and accrued sick pay policies to end the improper discrimination against females now entailed by them within the next few weeks, the legal action in this matter must be commenced.

For purposes of such a meeting, I can be reached by telephone at either (707) 2265564 in Napa, at the office of Coombs, Dunlap, Dunlap & Champlin, during the day, or at (415) 8416553, my residence, in the evening. I sincerely hope that this controversy can be settled in a manner that ends the unconscionable loss and injury to female teachers and other school employees that pregnancy under current policies of the District causes.

Yours truly,
Mary C. Dunlap
Attorney at law

[U.S. District Court title omitted in Printing]

ARGUMENT OPPOSING GRANTING OF TEMPORARY RESTRAINING ORDER

I

Since No Action Is Due Until February 23, 1973, There Is Time For a Hearing, and a Temporary Restraining Order Is Not Necessary or Justified.

Mrs. Berg, plaintiff herein, has represented to her employer, the defendant school district, that she is pregnant and that her expected date of delivery is March 24, 1973. The District's policy is not applicable to plaintiff Mrs. Berg until 30 days prior thereto, i.e., February 23, 1973. The three weeks until then provide sufficient time for this matter to be heard in connection with a motion for preliminary injunction, and militate strongly against the granting of a temporary restraining order, for the plaintiff cannot show that failure to obtain said order will result in "immediate and irreparable injury, loss, or damage . . ." (FRCivP 65(b)) within the next three weeks, and her interest in a temporary restraining order must be balanced against the right of the defendants to a hearing before any order is made against them.

The granting of such an order would appear to be futile in any case, since Rule 65(b) provides that it must expire within 10 days, unless extended for good cause. If granted on February 5, 1973, the order would thus expire no later than February 15, 1973 (again, unless extended).

II

This Action Is Premature, and the Complaint Is Speculative, in That Plaintiff Has Not Been Determined Ineligible to Continue Working as Long as She Wishes.

The plaintiff herein cannot allege that she is not being allowed by the District to work as long as she wishes, because she has not obtained a determination by the District's physician as to her physical condition. Only after such a determination can the application of the District's policy to the plaintiff be ascertained.

It is completely speculative to assert at this point that the District either will or will not permit Mrs. Berg to teach later than 30 days before her expected date of delivery.

On the basis of the above arguments, Defendants urge the Court to deny plaintiff's application for a temporary restraining order.

John B. Clausen, County Counsel

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SAM TEESE OPPOSING GRANTING OF TEMPORARY RESTRAINING ORDER

Sam Teese, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Personnel of the Richmond Unified School District. I am acquainted with Mrs. Sonja Lynn Berg and am familiar with the records of the District concerning her.

2. Mrs. Berg has represented to the District that she is pregnant and that her expected date of delivery is March 24, 1973.

3. The Richmond Unified School District's present maternity leave policy provides, in part, as follows:

> "Maternity leaves must become effective no later than the start of the seventh month of pregnancy." (Section 131.10, ¶2)

4. Revision of said policy is presently being negotiated by the District and the Certificated Employee Council.

5. On December 13, 1972, the Governing Board of the District authorized the Superintendent and me, on an interim basis, to receive applications by pregnant employees to work beyond the start of the seventh month of pregnancy, and to grant exceptions to the present policy in appropriate cases.

6. Pursuant to said authorization by the Board, I have informed pregnant employees that they may continue to work no later than 30 days before their expected date of delivery. I have also informed them that they may work longer if both of the following

conditions are met: (1) a physician selected by the District certifies that the employee's continued employment while pregnant is not medically inadvisable and presents no substantial hazard to the District, and (2) it is determined by the District that the employee's performance is not impaired as a result of her pregnancy.

7. In November, 1972, I advised Sonja Berg that the above interim administrative policy might be adopted by the Governing Board. Under that policy her maternity leave will not in any event begin until February 23, 1973.

8. On December 14, 1972, Mrs. Berg requested that her maternity leave begin 30 days before her expected date of delivery.

9. On December 20, 1972, Mrs. Berg informed the District that she wished to work until she and her doctor felt it necessary for her to begin maternity leave.

10. On December 27, 1972, I advised Mrs. Berg that she could be seen by a physician appointed by the District.

11. In accordance with the above-stated interim administrative policy, if a physician selection by the District certified that Mrs. Berg's employment past February 23, 1973, is not medically inadvisable and presents no substantial hazard to the District, the District intends to allow Mrs. Berg to continue working so long as said certification is valid and so long as Mrs. Berg's performance of her duties remains unimpaired.

(Jurat omitted)

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

To the defendants above-named and to their attorneys of record:

PLEASE TAKE NOTICE that on the 22nd day of February, 1973, plaintiff will move the court for a preliminary injunction enjoining defendants from terminating plaintiff pursuant to defendants' maternity leave policies and further enjoining defendants from otherwise applying those policies against the other members of the class she represents, as more fully set forth in the Complaint and in the Memorandum of Points and Authorities in Support of Preliminary Injunction filed herein. Please take further notice that hearing of this matter shall be held in the Courtroom of Judge Alfonso J. Zirpoli, Seventeenth Floor, Federal Building, Golden Gate Avenue, City of San Francisco, California, at 1:30 P.M. or as soon thereafter as may be heard.

Plaintiff's motion shall be based upon this notice, and the pleadings, records and files of the above-entitled case, and argument and evidence then and there presented.

Dated: February 7, 1973

Mary Cynthia Dunlap
Attorney for Plaintiff

[U.S. District Court title omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the court for a preliminary injunction enjoining the defendants, and each of them, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of this action, from terminating plaintiff and any other member of the class she represents, pursuant to the District's present maternity leave policy, or from otherwise implementing or applying said maternity leave policy to plaintiff or to any other member of the class she represents, on the grounds that:

1. unless restrained by this court, defendants will perform the acts referred to above;

2. such action by the defendants will result in irreparable injury, loss and damage to the plaintiff, as is more particularly detailed in the verified complaint and the affidavit attached to Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order and Motion for Preliminary Injunction;

3. the issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiff.

DATED: January 10, 1973

By: Mary C. Dunlap

[U.S. District Court title omitted in Printing]

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND POINTS AND AUTHORITIES

Come now the defendants and oppose the pending motion of the plaintiff for a preliminary injunction and pray that the said motion be denied.

The grounds for the defendants' opposition are as follows:

I

As to the alleged class the motion for preliminary injunction is not properly before the Court in that no order has been made under Rule 23 determining whether a class action may be maintained.

II

On the facts before the Court there exists no showing of *certain* and *irreparable* injury to the plaintiff justifying a preliminary injunction in favor of the plaintiff or anyone else, as against the harm such an injunction could work to the District.

III

On the facts before the Court, the District's revised interim provisions for exceptions from maternity leave policy, including the right of the Assistant Superintendent to require a medical report from a physician selected and paid by the District, do not violate any right under the laws or Constitution of the United States of America, the plaintiff or of anyone else.

IV

In any event, the Court should abstain from exercising any jurisdiction in this case on the ground that the constitutional validity of California law respecting teachers' maternity leaves has not been litigated in the state courts.

Said opposition is based upon this pleading, the affidavits and points and authorities filed herewith and in opposition to the plaintiffs' motion for temporary restraining order, the proposed order attached hereto, and the pleadings, records and papers on file in the above entitled action.

John B. Clausen
County Counsel

POINTS AND AUTHORITIES

The Court should not grant injunctive relief respecting the alleged class.

The affidavits before the Court do not demonstrate any individual other than Sonja Berg who objects to the policies of the District or who claims any violation of her rights. The Court has made no order under Rule 23 determining whether the suit may be maintained as a class action.

The Ninth Circuit has ruled that determination of the existence of a class must be accomplished under Rule 23 and not in the context of other procedures. *Gillibeau v. City of Richmond,* 417 F.2d 426 (9th Cir. 1969). Notwithstanding that for purposes of dismissal and a ruling as to jurisdiction a class action is assumed when pled, prior to ruling under Rule 23, *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972), that assumption does not warrant the granting of orders directly affecting the purported class, prior to a Rule 23 determination. *Dorfmann v. Boozer,* 414 F.2d 1168 (DC Cir. 1969).

II

The Court should not grant injunctive relief because certain and irreparable injury to the plaintiff is not demonstrated on the affidavits, and harm to the District is demonstrated.

> "It is well established that in order to obtain a preliminary injunction, the plaintiff must (demonstrate) . . . that denial of the injunction will

> cause certain and irreparable injury to the plaintiff."
>
> *Ordway v. Hargraves,* 323 F.Supp. 1155 at 1156 (DC Mass. 1971)

> "The great equitable power to enjoin a party *pendente lite* should not be exercised unless it is manifest that the normal legal avenues are inadequate, that there is a compelling need to give the plaintiff the relief he seeks, and that the injunction will not wreak greater harm on the party enjoined."
>
> *Dorfmann v. Boozer, supra,* 414 F.2d 1168 at 1174

It is evident from the affidavits that the District has not to this day made a final determination as to the day when Mrs. Berg's maternity leave must begin. The District's interim policy does not irrevocably mandate a fixed time for the beginning of maternity leave, but allows for individualized determination based upon a teacher's physical condition and the district's legitimate interests.

The only bases upon which Mrs. Berg can claim any injury are the reserved rights of the District under its policy a) to determine the date for commencement of maternity leave and b) to require a medical report from its own doctor. The existence of these rights does not work any injury as to Mrs. Berg. It is only their application that can give rise to a claim of harm, and they have not been applied. Unless her own doctor is willing and able to provide a report demonstrating a medical basis justifying

her continued employment after 30 days before her estimated term, the reserved rights of the District are not at issue.

On the other hand, granting injunctive relief will harm the defendants in several significant respects:

a) It will disable the District from taking action to minimize the disruptive effect of Mrs. Berg's impending absence upon her class. (Sam Teese's affidavit)

b) It will disable the District from taking action to obtain the best available substitute for her. (Sam Teese's affidavit)

c) It will expose the District to a high risk of disruption, inconvenience and liability. (Maxwell Thebaut's affidavit)

d) It will expose her students and classes to a high risk of disruption, inconvenience and neglect. (Sam Teese's affidavit and Maxwell Thebaut's affidavit)

III

The plaintiff is not entitled to injunctive relief.

There are only two elements of the District's interim maternity leave policy that are contested in the motion for preliminary injunction. They are the right of the District to make a final determination as to the date of commencement of maternity leave and the right of the District to require a medical report from its own physician.

The affidavit of Sam Teese demonstrates that the right of the District to control the commencement of maternity leave is mandated by its need to maximize educational continuity and its capacity to obtain the

best available long term substitute teachers. These considerations, alone, have been held to justify a much more rigorous maternity leave policy by the en banc decision of the Fourth Circuit Court of Appeals in *Cohen v. Chesterfield County School Board,* 467 Fed.2d 262 (4th Cir. 1973), a copy of which is appended hereto.

The affidavit of Dr. Maxwell Thebaut demonstrates that the right of the district to determine a commencement date for maternity leave and to require a report from its own physician are medically justifiable to the point of prudent necessity.

In her suit for injunctive relief, Mrs. Berg claims a constitutional right to personally determine the beginning time of her maternity leave in consultation with her personal physician. As demonstrated by Exhibit E to her complaint, her physician stated unequivocally to the District on December 6, 1972 that Mrs. Berg could continue to work until the date of her confinement, March 25, 1973. It hardly requires expert testimony to conclude that a December assessment of the physical condition of a pregnant woman to a point in time four months in the future, is dubious. Dr. Thebaut has stated that a medical report more than two weeks old is not reliable with respect to a woman in late pregnancy, and that a medical report certifying a teacher to work until the date of her confinement would be inconsistent with prudent medical practices. In the face of this evidence, it is not conceivable that a Court could hold that the District may not require a medical report from a physician of its choosing. It would probably be negligent if it failed to obtain such a report.

In addition, Dr. Thebaut's affidavit sets forth multiple serious risks that would be presented to the District and to her classes if Mrs. Berg was enabled to continue work as long as she pleased into a condition of late pregnancy.

Whatever test the court should choose to apply, the defendants contend that the interests of Mrs. Berg's students in their educational program, in the quality of their substitute, and in avoiding a medical emergency in the classroom; and the interest of the District in avoiding undue disruption of Mrs. Berg's class and the serious risk of a medical emergency at school, compel the conclusion that the plaintiff is not entitled to a preliminary injunction.

IV

The Court should abstain.

The questions presented by this suit are original questions that have not been passed upon by the appellate courts of California. Maternity leave is specifically authorized by Section 13456 of the California Education Code.

The doctrine of abstention is applied in all federal court actions to obtain sanctions respecting state statutes, and regulations and practices thereunder. It provides that the federal courts must avoid the determination of federal constitutional questions arising in the context of state law when the law of the state is in doubt. *Romero v. Coldwell,* 455 F.2d 1163 (5th Cir. 1972)

John B. Clausen
County Counsel

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SAM TEESE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Sam Teese, being duly sworn, deposes and says:

1. I am Assistant Superintendent for Personnel of the Richmond Unified School District, and make this affidavit in such capacity.

2. This affidavit supplements the affidavit heretofore given to me, opposing granting of temporary restraining order in the above-entitled action, which said affidavit is incorporated herein by reference.

3. Pursuant to authorization by the Governing Board of the Richmond Unified School District, on February 16, 1973 the District Superintendent and I issued revised interim provisions for exceptions from maternity leave policy, providing as follows:

"Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the fœtus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the fœtus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.

Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement."

A copy of the revised interim provisions was delivered to Sonja Berg on February 16, 1973. If a medical report conforming to part C and recommending continued employment is received on or before February 23, 1973, Mrs. Berg's employment may continue to March 2, 1973, pending a medical report from a District selected physician if I should require it, and my determination as to a beginning date for her maternity leave.

4. I am informed and believe and on that basis state that Robert F. Tomfohrde is not a medical specialist in the fields of obstetrics or gynecology.

5. Teachers in the Richmond Unified School District are, inter alia, subject to the following conditions with respect to their employment:

a) Teachers are usually required to maintain control and direction of approximately 30 active students.

b) Teachers are usually required to remain with their classes for periods of up to one hour or more without interruption.

c) Teachers usually undergo jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d) Teachers are usually required to supervise student games and sports.

e) Teachers are usually required to cope with minor emergency situations including, but not limited to, student fights, accidents, and illnesses.

f) Teachers usually drive to and from work.

The aforementioned conditions are specifically applicable with respect to Sonja Lynn Berg.

5. The regulations of the Richmond Unified School District provide for physical or mental examinations of teachers by a District approved physician at District expense whenever the District Superintendent concludes that such an examination is required for the safety or welfare of students or school employees.

6. Neither Sonja Lynn Berg or any other employee of the Richmond Unified School District is subject to termination of her employment by virtue of maternity leave.

7. Maintaining continuity of the educational process is a fundamental policy of the Richmond Unified School District and an essential element in any educational program. Maternity leaves usually last for periods longer than six weeks and materially interfere with continuity of education in the affected classes. One objective of the District in determining the dates for commencement of maternity leave is to schedule such leave, if practicable, to complement elements of the continuity of classroom instruction such as semester breaks, Christmas and spring vacations, report card periods, or units of study. This objective requires that the district retain ultimate control as to the commencement of maternity leave. Sick leaves

rarely last for more than one week. The over-all impact of sick leave on continuity of the educational process is much less than that of maternity leave.

8. When a teacher is required to be absent, a substitute teacher is provided by the District for her class. Maternity leave absences require substitutes for prolonged terms, which is not the case as to the great majority of sick leave absences. The District always tries to obtain the best qualified and most competent substitute teachers available to it. This is a particularly significant consideration in the case of long term absences. Desirable substitute teachers for long term classes are difficult to obtain and there is competition between different school districts for their services. The ability of the Richmond Unified School District to determine predictable dates for the commencement of maternity leave materially improves its capacity to obtain desirable substitute teachers. Factors limiting the capacity of the District to determine such predictable dates will impede its ability to obtain the best available substitute teachers for the classes left by teachers on maternity leave.

Sam Teese

(Jurat omitted)

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF MAXWELL THEBAUT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Maxwell Thebaut, being duly sworn, deposes and says:

1. I am a physician, licensed to practice medicine in the State of California. I am a specialist in the medical fields of obstetrics and gynecology, certified by the American Board of Obstetrics and Gynecology. I have practiced my medical specialty continuously since 1933 to the present excepting for four years during World War II. My offices are in Oakland, California.

2. I have been retained by the Richmond Unified School District to give my opinion respecting aspects of the employment of pregnant teachers during the late period of their pregnancy. In referring to "late" pregnancy I mean the six weeks prior to an estimated date of delivery.

3. In giving my opinion I have taken into account the following specific factors in addition to my experience, medical knowledge and general knowledge respecting schools and teachers:

a. That a teacher is usually required to maintain control and direction of approximately 30 active students.

b. That a teacher is usually required to remain with her class for periods of up to one hour without interruption.

c. That a teacher usually undergoes jostling and bumping, sometimes on stairways, incident to the movement of students on school premises.

d. That a teacher is usually required to supervise student games and sports.

e. That a teacher is usually required to cope with minor emergency situations including but not limited to student fights, accidents, and illnesses.

4. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies. Common emergencies are:

a. placenta previa: sudden onset of severe bleeding;

b. placenta abruptio: premature separation of the placenta from the uterine wall;

c. rupture through the scar of previous caesarean operation;

d. breaking of the bag of water.

Emergencies of the kind described above commonly occur in up to 20% of all pregnancies, cannot be anticipated, are disabling, and require prompt medical attention.

5. In my opinion a teacher in late pregnancy is likely to be temporarily disabled or required to leave her class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies, some of which are:

a) urination—In virtually all pregnancies frequent and uncontrollable urination is required as a result of pressure by the fœtus on the bladder.

b) incontinency—In approximately half of all pregnancies, incontinency is present or may be precipitated by sneezing, coughing, jumping, or like stresses.

c) false labor—In somewhat less than half of all pregnancies false labor occurs in the last month prior to delivery.

d) true labor—In all pregnancies, the time when true labor will begin cannot be predetermined absent induction of labor.

6. In my opinion a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her fœtus:

a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises;

b. When she is required to supervise student games and sports;

and that such risk is greatly increased when such jostling and bumping or games and sports take place on stairways.

These risks exist because a woman in late pregnancy suffers an abnormal distribution of her body weight. As a result, women in late pregnancy are often awkward and uncertain when standing or walking. These problems are magnified if inappropriate footwear is worn. Women in late pregnancy are

peculiarly vulnerable to even modest elements of jostling and bumping that commonly occur in the movements of crowds of people and in the course of games and sports. Any of the conditions heretofore described could be precipitated by such jostling, bumping, or falling incident thereto.

7. In my opinion a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses.

The physical awkwardness that is present in late pregnancy will in most cases make it difficult for a teacher to respond in situations calling for sudden movement and exertion. Urination or incontinency could easily be precipitated by actions, such as bending or lifting, that she might be required to take. A teacher could easily become so disabled by her own movements or a minor blow, that she would be helpless to take any effective action.

8. It is my opinion that with respect to virtually all pregnancies an exact predictive date for delivery cannot be determined. Among the factors creating uncertainty with respect to the date of delivery are the following:

a) The term of a normal pregnancy is variable within a range of from 260 to 300 days from conception.

b) The date of conception is rarely ascertainable.

9. It is common practice in the medical profession to estimate a delivery date based upon Nagele's

rule (266 days from conception) and an estimated date of conception. It is commonly recognized in the medical profession that such estimated dates are not exact and that delivery can be expected at any time from two weeks before to two weeks after a date so calculated.

10. In my opinion, considering a teacher of average stamina, health and normal pregnancy; a rule requiring her to stop working at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery.

11. In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology.

12. In the medical profession it is recognized that normal pregnancy is a natural condition and not an illness resulting from any injury, infection, malfunction or disfunction of the body.

13. It is my opinion that more than 85% of all deliveries are the result of voluntary pregnancies and that proportion of voluntary pregnancies is increasing.

Maxwell Thebaut, M.D.

(Jurat omitted)

[U.S. District Court title omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND OF MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

This class action seeks injunctive and monetary relief for the deprivation of constitutional and statutory rights guaranteed to plaintiff and to all members of the class she represents under the Fourteenth Amendment to the Constitution and under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et seq. Plaintiff alleges that, unless restrained from so doing, defendants, and each of them, will terminate plaintiff arbitrarily and capriciously from her employment as a school teacher in defendant District on February 24, 1973, a full month prior to the expected date of her confinement, despite her doctor's determination that she is wholly capable of continuing work until March 23, 1973. The federal court for the Northern District of California decided almost one full year ago that maternity leave policies which discriminate against females in the fashions described hereinafter are repugnant to the Fourteenth Amendment's guarantee of equal protection of the laws. Williams v. San Francisco Unified School District, 340 F. Supp. 438 (1972, opinion and order for preliminary injunction). Since that decision, other federal jurisdictions have followed the reasoning of the *Williams* court. See part II., *infra,* of this memoradum.

By this action, plaintiff also seeks to prevent further application of defendant District's current maternity leave policies as against other female employees who are members of the class she represents, and plaintiff seeks to obtain monetary damages arising from application of the unlawful maternity leave and sick pay policies of defendants to herself and to the class she represents.

II. Facts

Plaintiff Sonja Lynn Berg ("plaintiff") is a teacher of kindergarten children at the Stege School of defendant Richmond Unified School District ("District"). Plaintiff has been employed by defendant District for at least six (6) years.

On or about December 6, 1972, plaintiff's attending physician, Dr. Robert Tomfohrde, informed defendants by a letter to Mr. Sam Teese, Assistant Superintendent of Personnel of the defendant District, that plaintiff could be expected to deliver her baby on or about March 24, 1973. Dr. Tomfohrde indicated in that letter that plaintiff was medically able to teach until the expected date of her confinement. See Exhibit "E" of plaintiff's Complaint. By affidavit of Dr. Tomfohrde notarized and sent to defendants in early January, 1973, it was repeated that plaintiff was and is medically able to continue teaching until March 24, 1973, which affidavit is hereto appended as Exhibit "A".

Until December 13, 1972, defendant District had a maternity leave policy that compelled every pregnant

employee to commence leave on or before the first day of the seventh month of pregnancy. See Exhibit "A" of plaintiff's Complaint. At meetings in late November and early December, defendant Board adopted an "interim" maternity leave policy, described by defendant Superintendent W.W. Snodgrass as permitting individual consideration of requests by employees for extension of the pre-leave period beyond the seventh month line. See Exhibits "B" and "C' of plaintiff's Complaint.

For plaintiff, the practical application of defendants' "interim" maternity leave policy has been as follows: On or about December 27, 1972, plaintiff was invited by letter to submit to a medical examination by a District-appointed physician, in order to determine whether her request for an extension from the defendants' compulsory leave policy would be permitted in her case. See Exhibit "G" of plaintiff's Complaint. In that letter, defendants indicated that even were a physician appointed by them to approve such an extension, the District reserved the right to compel plaintiff to leave at an earlier time "should liability or educational program become a consideration".

In early January, 1973, by letter from her attorney, plaintiff refused to submit to said prerequisite examination in order to gain a conditional extension of her pre-leave period. See Exhibit "H" of plaintiffs Complaint. In that letter, plaintiff's counsel offered to join in a conference with legal representatives of defendants about defendants' maternity leave policies. To the date of this filing, neither defendants nor any

of their representatives have made any effort to contact plaintiff's attorney to arrange such a conference. Therefore, it must be concluded that every practicable means of extrajudicial resolution of the rights of plaintiff and those of the affected class has been exhausted by the plaintiff here.

III. This Court Has Personal and Subject Matter Jurisdiction in This Action.

Jurisdiction over the Complaint and Prayer in the instant case is conferred on this Court by Title 28 of the *United States Code,* section 1343(4) of which provides that this court shall have original jurisdiction in every action authorized by 42 U.S.C. section 1983, which provides for redress of constitutional and civil rights deprived under color of state law. This court has already recognized its jurisdiction over the parties and subject matter of this action, by virtue of the identity of its authority herein with its jurisdictional authority as recognized in *Williams, supra,* 340 F.Supp. 438 at 441.

Jurisdiction is also conferred on this court by section 2000e-5(f) of Title 42 of the *United States Code,* which gives original jurisdiction to this court in all actions authorized by 42 U.S.C. 2000e et seq., known as Title VII of the Civil Rights Act of 1964, which provides for injunctive and other relief against discrimination in employment on account of race, religion, national origin or sex.

IV. The Decision of This Jurisdiction in *Williams v. San Francisco Unified School District* Fully Sustains Every Claim of Plaintiff Herein as to the Denial of her Constitutional Rights by Defendants' Maternity Leave Practices as Described Herein.

As in *Williams,* it is the arbitrary and sex-stereotyped line-drawing of defendants' maternity leave policy that affronts the equal protection clause in the case at hand. The interim maternity leave policy of defendants, adopted on December 13, 1972, utilizes the first day of the seventh month of pregnancy as a general norm for the commencement of a compelled maternity leave. See Exhibit "B" of plaintiff's Complaint. In order for plaintiff or any other pregnant employee to escape the irrational and discriminatory effects of that seventh-month line, she must prove herself an exception to the stereotype of inability of 7-months pregnant employees that the interim policy incorporates.

As plaintiff herein has discovered, escape for a pregnant employee from that stereotype is hardly easy. Her own doctor's affidavit of her ability to continue teaching has been found unsatisfactory. Her own proclamations of ability and desire to continue teaching beyond the arbitrary leave date imposed upon her by defendants have proved unavailing. As in Williams, "the District has singled out pregnancy as the subject of the restrictive provisions of its mandatory leave policy" *Williams, supra,* 340 F.Supp. 438 at 441.

And, as in *Williams,* the policy of defendants lacks rational basis, as minimally required for the equal protection for plaintiff and her class. When the application of defendants' leave policy, which purports to treat pregnant employees individually, is examined as to plaintiff herein, its utter irrationality is illumined. In the instant case, not a single indicia of plaintiff's incapacity to teach safely and effectively until March 24, 1973, is evident. Rather, the available evidence shows that the absolute contrary proposition is true, as plaintiff's doctor has determined. See Exhibit "A" appended hereto. To presume plaintiff's incapacity in the face of this evidence, to ignore all available evidence, and to make the presumption of her incapacity turn upon examination by a District-appointed physician surely does not constitute a rational plan for effectuating the purposes recited in defendants' letter to her, to wit, to insure educational effectiveness and to minimize alleged risks of District tort liability. When the feature of such a District-appointed physician's relatively superficial knowledge of plaintiff's medical condition, in contrast to that of her own doctor, is added to the configuration of defendants' maternity leave policy as applied herein, the irrationality of that means of advancing those alleged purposes of defendants is underscored.

Even if a rational nexus between defendants' means and ends could be demonstrated herein, that nexus could not sustain their policy in violation of the rights of plaintiff and her class to continue working free of invidious discrimination. Because the right of

plaintiff and her class to employment unencumbered by invidious discrimination must be constitutionally assured, only a "compelling governmental interest" could save the maternity leave policy at issue in this action. *See Williams,* 340 F. Supp. 443.

In scrutiny of the maternity leave policy of defendants herein, no such "compelling governmental interest" emerges. Like the defendants in *Williams,* defendants in this case have posited a variety of interests that are conceptually legitimate. See Exhibit "G" of plaintiff's Complaint. Yet the relationship between those interests and defendants' policy is oblique, at best. Assuming that educational effectiveness is the strongest of the governmental interests recited, the means by which a mandatory leave, or District-appointed physician's approval and a somewhat later mandatory leave, will operate to advance educational effectiveness among pregnant teachers is difficult to comprehend.

Furthermore, defendants' maternity leave policy isolates a class of employees, by sex, for peculiarly burdensome treatment. Hernia patients, about whom stereotypes could easily be developed with respect to tort liability or educational effectiveness, face no hurdles in their requests for leave that in any sense compare to the barriers to pregnant employees under defendants' leave policies. See Exhibit "B", appended hereto, consisting of section 131.07 of defendants' health and injury leave regulations. Thus, the emerging principle of equal protection that sex-discriminatory state action is *prima facie* unconstitutional would

apply to vindicate the rights of pregnant employees in the instant case. The primary reason for that still-nascent but strong principle is that sex, like race and lineage, is a category that courts should treat as suspect in every instance where it is incorporated into state action which disproportionately burdens persons of one sex or the other. As perceived by Justice Raymond Peters for a unanimous California Supreme Court:

> "Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible."
>
> *Sail'er Inn v. Kirby,* 5 C.3d 1, 485 P.2d 529 (1971).

Because the actions of defendants herein cannot survive the first-level test of equal protection to plaintiff, by a showing of "rational basis" for the defendants' maternity leave line and physician prerequisite, these issues as to the compelling governmental interest required to be shown at the second level of equal protection need not be reached by this court. However, in the light of the arguments offered above, plaintiff submits that defendants' maternity leave policy would fail that more rigorous test, if examined, whether because of the presence of a fundamental right or because of a suspect category, against that higher order of the equal protection guarantee.

V. The Reasoning of *Williams* Has Been Supported in Maternity Leave Decisions Rendered Since *Williams,* of Other Federal Jurisdictions.

In *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (D.C. Ohio, 1972), Judge Carl Rubin determined that a pregnant teacher who had been terminated for failure to take her leave at the end of her fourth month of pregnancy must be reinstated, with full back pay and all "fringe" benefits. Judge Rubin's reasoning tracks the thinking of Judge Harris in *Williams,* particularly where Judge Rubin determines that "(i)t is the very inflexibility" of the maternity policy in that case that offends the Fourteenth Amendment. *Heath, supra,* 345 F. Supp. at 505.

In the instant case, the inflexibility of defendants' policy is not mitigated by its alleged consideration of individual cases, nor by its later line of mandatory leave, as compared with the line at issue in *Heath.* Plaintiff and her class herein are as thoroughly victimized by a rigid stereotype about their incapacity to continue working as were plaintiff in *Heath* and *Williams;* in this case as in those the medical needs and personal wishes of pregnant employees, as distinct persons, are being ignored.

In *Cohen v. Chesterfield County School Board,* 467 F.2d 262 (4th Cir., 1972), Judge Winter articulated the constitutional objection to such policies as that of defendants herein most strongly. In that case, Judge Winter found no reason to support a forced leave at

any time when the employee teacher and her own doctor conclude that "she can perform her duties beyond that [compelled leave] date." 467 F.2d at 265.

The federal policy enunciated by the Fifth Circuit Court of Appeals in *Schattman v. Texas Employment Commission,* 459 F.2d 32 (1972) has furthermore been clarified by Congress since the decision in *Williams* was announced. Title XII of the 1964 Civil Rights Act has been amended to include agencies such as defendant T.E.C. of that case as employers for Title VII purposes, in H.R. 1746, the Equal Employment Opportunity Act of 1972. *Cf.* discussion of of the amendments at p.H1861 of the *Congressional Record* (March 8, 1972). Thus, any conceivably reasonable foundation for *Schattman* that might have existed, before *Williams* was decided, has since disappeared. Also since *Williams,* the case of *LaFleur v. Cleveland Board of Education* was reversed, by the Court of Appeals for the Sixth Circuit, which struck down an eighth month maternity leave policy that the trial court had upheld on the ground of extraordinary dangers to pregnant teachers in Cleveland. 465 F.2d 1184 (6th Cir., 1972, reversing 326 F.Supp. 1208 (Ohio, 1971)). Finally, in the decision of *Robinson v. Rand,* a federal district court for Colorado has called the decision of *Struck v. Sec'y of Defense* into serious question, by holding that a pregnant W.A.F. could not lawfully be discharged. 460 F.2d 1372 (D.Colo., 1972).

To summarize, the palpable trend of federal decisions since *Williams,* which plaintiff contends should determine this case in her favor, serves to uphold

the rationale of *Williams.* Those factors of sex discriminatory operation of mandatory maternity leave isolated by this jurisdiction in *Williams* have served as guideposts to other federal courts facing similar claims.

VI. Defendants' Maternity Leave Policies Violate Title VII of the Civil Rights Act of 1964.

The arbitrary leave line and physician prerequisite of defendants' maternity leave policies at issue herein contravene Title VII, section 703 (a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e- 2(a), which provides in pertinent part:

> "(a) Employer practices.
>
> It shall be an unlawful employment practice for an employer -(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or
>
> -(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex, * * *."

The adverse effects upon plaintiff and the class that she represents herein, caused by defendants' classification of pregnancy as an extraordinary form of noncompensable, automatic disqualifier from employment, include loss of wages, interference with the right to

work free from invidious classifications, and stigmatization on account of sex.

As the Guidelines of the Equal Employment Opportunity Commission on Title VII indicate, defendants' policies herein are totally insupportable under the Civil Rights Act of 1964. These Guidelines are proper authority for the interpretation of Title VII and, according to the United States Supreme Court, are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed. 158 (1971); see also, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir., 1971).

In application to the specific case at hand, the Guidelines provide relevantly as follows:

> "Section 1604.10 Employment Policies Relating to Pregnancy and Childbirth
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII."
>
> —37 *Fed. Register* 6835 et seq.

Under Section 1604.10(a) of the Guidelines, the *mandatory* nature of any maternity leave policy subjects that policy to challenge under Title VII, for a mandatory policy that isolates employees for exclution because of pregnancy, even for a temporary period, categorizes on account of sex in a disadvantageous fashion that directly contradicts the terms and purpose of Title VII, quoted above. See also, Guideline section 1604.2 (b) (1).

Guideline section 1604.10(b) further prohibits the treatment of childbirth or pregnancy differently than all other temporary disabilities. As that section in part provides,

> ". . . policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

In defendants' distinctive treatment of pregnancy, in terms of commencement and duration of leave at the discretion of defendants and exclusion of pregnancy from usual sick leave pay, accrued and otherwise, there is a series of clearcut violations of Title VII as implemented by the above-cited Guideline. Compare defendants' regulation 131.07(5), hereinafter appended as Exhibit "B", with the unwritten exclusion of plaintiff and other pregnant employees from that benefit, as declared by Mr. Sam Teese; *see* section XV of plaintiff's Complaint.

It cannot be questioned that defendants, and their agents, as local governmental agencies and officials, are encompassed by the definition of "employer" given to that term by the 1972 Amendments to Title VII, passed by Congress in the form of the Equal Employment Opportunity Act of 1972 (H.R. 1746). *See* sections 701 (a) -(c) of Title VII of the 1964

Civil Rights Act (as amended, March, 1972; see also, discussion of the applicability of the Title to local government, at p. H 1861 of the *U.S. Congressional Record* (March 8, 1972).

VII. This Is a Proper Class Action and Plaintiff Sonja Lynn Berg Legitimately Represents the Class on Whose Behalf It Is Brought.

Just as the plaintiff sought to enjoin the sex-discriminatory maternity leave policies of defendants in *Williams, supra,* plaintiff herein seeks an injunction against the application of defendants' maternity leave policies, as against herself and every other qualified employee of defendant. Rule 23 of the *Federal Rules of Civil Procedure* permits this class, just as it was found to allow an identically constituted class in *Williams.*

Plaintiff is uncertain as to the exact numbers of persons who are presently or prospectively vulnerable to defendants' discriminatory policies sought to be enjoined here. As a large and metropolitan school district, there must be thousands of such employees.

As in *Williams,* the common legal tie of all members of this class is composed of their mutual susceptibility to discrimination on account of sex, caused by defendants' maternity leave and sick pay policies. Plaintiff, as a pregnant employee of defendants who is presently endangered by the enforcement of the policies at issue herein, is dedicated to the full and fair representation of all members of the class affected by those policies.

Furthermore, like *Williams,* the defendants herein are acting in the formulation and enforcement of their maternity and sick leave policies against this class as a whole. Thus, final injunctive relief to the entire class will be appropriate, as is required by Rule 23 (b) (2) and (3).

VIII. Plaintiff's Complaint Properly Supports Issuance of Temporary and Permanent Injunctions, to Restrain Further Enforcement of Defendants' Maternity Leave Policies Against Plaintiff and All Other Members of the Affected Class Herein.

Injunction of the type and for the purpose prayed for by plaintiff in her Complaint has already been construed as a proper and valid remedy to prevent the deprivation of constitutional rights sought to be protected by this action. *See Williams, supra,* 340 F. Supp. 438 at 449. The status quo in the instant case will not be preserved if the injunctive relief prayed for herein is denied. Defendants will terminate plaintiff on February 24, 1973, which date is but three weeks from the date of this filing. Impairment of the status quo in the instant case entails irreparable injury to plaintiff, for the deprivation of her right to employment by the compulsory leave threatened by defendants cannot be measured by money nor could it be adequately remedied at law.

IX. At Most a Nominal Bond Should Be Set by This Court as the Result of the Grant, If Any, of This Complaint for Injunctive Relief, If Any Such Bond Be Set.

Rule 65 of the *Federal Rules of Civil Procedure* requires that a bond be set for and upon the issuance of a temporary restraining order or a preliminary injunction. This Court has discretion as to the amount of said bond. Ferguson v. Tabah, 288 F.2d 665 (2d Cir., 1961).

Plaintiff urges this court to set any such bond at a nominal amount. No material damage will accrue to defendants by the grant of injunctive relief as prayed for by plaintiff herein. Furthermore, a bond of any great amount will prove great hardship to plaintiff herein, who is not possessed of sufficient funds to support a large bond in this action.

X. Conclusion

The maternity leave policies of the Richmond Unified School District, which compel unpaid leave for maternity at a date and for a period that is arbitrary and that is in the sole discretion of defendants, without regard to the medical conditions or personal plans of individual persons employed by defendants, discriminate invidiously against the class represented by plaintiff in this action, including plaintiff herself, in violation of the Fourteenth Amendment to the United States Constitution and in contravention of Title VII of the Civil Rights Act of 1964. Defendants' application of these policies to plaintiff and others threatens irreparable injury to plaintiff and to each such other employee without adequate legal remedy for that harm.

Therefore, plaintiff respectfully requests that this court grant a preliminary injunction restraining the District, by and through its individual agents and employees including defendants hereto, from terminating plaintiff or any other member of the class she represents, pursuant to the District's maternity leave policies, or from otherwise implementing or applying said maternity leave policy or any other policy in disregard of the individual medical needs and personal wishes of plaintiff and of every other employee subject to said implementation or application.

Dated: January 28, 1973

Mary Cynthia Dunlap
Attorney for Plaintiff

Exhibit "A"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE

Dr. Robert Tomfohrde, being duly sworn, deposes and says:

I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973.

Dr. Robert Tomfohrde, M.D.

Dated: Dec. 21, 1972

(Jurat omitted)

Exhibit "B"

. . .

Section 131.07 Health and Injury

1. Health Leave

   1.1 Any certificated employee classified as a permanent employee may be granted an extended leave of absence with or without use of pay at discretion of employee for purposes of health, rest and recuperation. Extended leave may be granted for a six months or one-year period to correspond as nearly as possible with the schedule of the school year.

   1.2 Upon request of the Superintendent, the employee shall provide a health affidavit from a licensed physician to verify the need for the requested health leave.

   1.3 Prior to the granting of a health leave, the Governing Board may require a physical examination to be performed by a physician selected by the Governing Board. Such examination shall be at no cost to the employee.

2. No salary or sick leave deduction is made for absence due to contagious disease, which may be presumed to have been contacted during the performance of school duties with other persons having a contagious disease, for the period of isolation or quarantine.

3. Full time certificated personnel shall be allowed absence from duty because of personal illness or injury for ten (10) full days each school year without loss of salary. Unused days of such leave shall be accumulative with a maximum of ten (10) days per year allowable. (Educational Code Sec. 13468).

4. Personal illness of more than five (5) school days duration shall be verified by a certificate from a licensed physician. Such certificate shall be given to the Principal who shall in turn forward said certificate to the School Health Department.

5. Beyond the number of days of absence allowed for personal illness or injury with full salary, full time certificated employees shall be al-

lowed their regular salary, less the cost of a substitute, for a period of five (5) school months, exclusive of those days in which full salary was allowed. (Education Code, Section 13456). If the difference is less than $3.00 per day, a minimum of $3.00 per day shall be paid the absent employee. The Governing Board will not allow any difference in salary of substitute, and salary of regular employee beyond the five school month period.

REPORTER'S TRANSCRIPT:

Hearing on Motion for Preliminary Injunction, in part:

Thursday, February 22, 1973

[14] MS. DUNLAP: Thank you.

MR. MARCHESI: May the Court please, I think the defendants' arguments are fairly summarized in the points and authorities already submitted. However, I would like to offer some supplemental remarks and to respondent to Ms. Dunlap's arguments this morning.

First of all, if the plaintiff's motion rests on two independent grounds, first Title 7 and secondly the constitutional grounds, then I think we can dispose of the Title 7 ground rather quickly. There's a series of cases set forth clearly in the Annotated Code under Title 7, Section 2000(e)(5), which states that a prerequisite to a suit under Title 7, under that section, under that division, is a notice from the Commission,

the Equal Employment Opportunity Commission, that it has tried to gain compliance of the regulations by the employer but that it has not done so. There has been to my recollection no allegation in the plaintiff's pleadings so far that there has been notice to the Commission that a claim has been made or that any notice has been received. Further—

THE COURT: Do you question the validity of that guideline?

MR. MARCHESI: Well, I think that the Court cannot reach that guideline, since there's been no compliance with the prerequisites.

THE COURT: But at times we have to be reasonable **[15]** persons. If you don't question the reasonableness of the guideline, why not so advise the Board and end the matter?

MR. MARCHESI: Your Honor, if the Court please, I would like to point out a further prerequisite before I answer that question.

THE COURT: Yes.

MR. MARCHESI: In certain States the section that I referred to, Section 2000(e) in Title 42 of the Code states that in States where there's a procedure for obtaining relief from allegedly unfair labor practices, the State's procedures have to be exhausted before going to the Equal Employment Opportunity Commission. Thus in this case the whole procedure under Title 7 has been disregarded and the plaintiff has attempted to forego all of that and come directly to the Court.

. . .

[18] . . .

MS. DUNLAP: I wish to reply briefly to two points, [19] Your Honor.

THE COURT: Yes.

MS. DUNLAP: If Your Honor wishes to know about them. First, the United States Attorney General has authorized issuance of a right to sue letter in this case. I was informed of this fact yesterday by a man named Andrew Ruzicco, who is the Deputy Chief of the Education Section of the Civil Rights Division of the Department of Justice. He telephoned me, I told him he ought to phone the Court. Their letter to sue is sitting there in Washington waiting for a letter from the E.E.O.C. to come there which was mailed last Friday. The right to sue letter will establish without question the jurisdiction of this Court over the Title 7 action. It is not simply a statement of counsel or a general philosophical proposition that this Court has original and sole jurisdiction over Title 7 actions.

. . .

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

(Petition for Writ of Certiorari, Appendix C, p. 30)

[U.S. District Court title omitted in Printing]

SUPPLEMENTAL MEMORANDUM REGARDING JURISDICTION

Plaintiff's Complaint for Injunctive Relief and Damages in the above-entitled action is based upon 42 U.S. Code section 2000e et seq., known as Title VII of the 1964 Civil Rights Act, as well as upon the equal protection clause of the Fourteenth Amendment to the U. S. Constitution. (*See* Plaintiff's Complaint, Parts I., III. and XV.; *see also* Plaintiff's Memorandum of Points and Authorities in Support of Temporary Restraining Order and of Motion for Preliminary Injunction, parts I. and III.)

Under Title VII of the 1964 Civil Rights Act, a notice of the right of plaintiff to institute civil action against defendants has been held to be a prerequisite to federal jurisdiction over said action. Cox v. United States Gypsum Company, 409 F.2d 289 (7th Cir., 1969). Said prerequisite to this Court's jurisdiction has been fulfilled in the instant case. A notice of plaintiff's right to sue upon E.E.O.C. complaint No. TSF 3-0929 was issued on February 21, 1973, by Mr. Brian K. Landsberg, Chief of the Education Section of the Civil Rights Division of the United States Department of Justice. That notice is hereto appended, marked "Exhibit A", and is herein incorporated by this reference.

Mary C. Dunlap
Attorney for Plaintiff

Dated: March 1, 1973.

"Exhibit A"

Feb 21 1973

JSP:BKL:dcr
DJ 169-11-0

Mrs. Sonja Berg
1139 Willow Street, Apt. 2
Pinole, California 94564

Re: EEOC Charge Against Richmond Unified School District, No. TSF 3 0929

Dear Mrs. Berg:

Because you have filed a charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and this Department has determined that it will not file any lawsuit based upon that charge within that time and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against the above named respondent.

The civil action must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of

the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court for the Northern District of California located in San Francisco.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1905 Market Street, San Francisco, California.

We request that you send this Department a copy of any complaint initiating suit.

Sincerely,
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

By:
Brian K. Landsberg
Chief
Education Section

cc: EEOC District Office
San Francisco, California
Mary C. Dunlap, Esquire
Napa, California

[U.S. District Court title omitted in Printing]

AMENDMENT TO COMPLAINT

After XI. at line 16 of page 5 of plaintiff's Complaint in the above-entitled action, the said Complaint is amended to include the following:

"Plaintiff's claim under 42 U.S.C. 2000e et seq. filed as TSF3-0929 with the Equal Employment Opportunity Commission was first deferred to and was returned from the California Fair Employment Practice Commission, before formal filing of said claim by the federal Commission. A letter declaring such referral back is filed with Plaintiff's Memorandum of Points and Authorities in Opposition to Motion to Dismiss Civil Action, in C-73-0192-AJZ, marked "Exhibit A", and is incorporated herein by this reference."

Mary C. Dunlap

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION AND MOTION TO FILE SUPPLEMENT TO COMPLAINT

To: Richmond Unified School District, Richmond Board of Education, W. W. Snodgrass, and their attorneys:

Please take notice that on ....., 1973, in the Courtroom of the Honorable Alfonso J. Zirpoli, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, at ..... .m. or as soon thereafter as counsel may be heard, plaintiff Sonja Lynn Berg will and does hereby move the afore-captioned Court as follows:

Said plaintiff moves this Court under Rule 15(d) of the Federal Rules of Civil Procedure and under Rule 118(b) of the Local Rules of Practice for the United States District Court for the Northern District of California for leave to file a supplement to plaintiff's complaint in the above-entitled action, which supplement shall set forth the issuance of notice to plaintiff of her right of action under 42 U.S.C. section 2000e et seq. on February 21, 1973, and for leave under Local Rule 118 (b) to file said supplement without filing of an entire supplemental complaint by plaintiff.

Plaintiff's said motion will be based upon this notice of motion, the supplement to complaint, memorandum of points and authorities in support of motion for supplement, and the proposed order filed herewith and all other pleadings, papers and records on file in the above-entitled action.

Mary C. Dunlap

Dated: April 22, 1973

[U.S. District Court title omitted in Printing]

SUPPLEMENT TO COMPLAINT

After line 11 of page 6 of plaintiff's complaint in the above-entitled action, the said complaint is supplemented to include the following:

> "On February 21, 1973, the right of plaintiff to maintain this action under 42 U.S.C. 2000e et seq. was noticed by letter from the United States Department of Justice. Said letter is attached to Plaintiff's Supplemental Memorandum Re Jurisdiction marked "Exhibit A", and is incorporated herein by this reference."

[U.S. District Court title omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO FILE SUPPLEMENT TO COMPLAINT

I. Rule 15(d) of the Federal Rules of Civil Procedure Expressly Provides for Supplementation of the Sort Moved for by Plaintiff Herein.

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."
>
> —Rule 15, Federal Rules of Civil Procedure.

Plaintiff filed the above-entitled action on February 5, 1973. Issuance of a letter embodying notice of plaintiff's right of action under 42 U.S.C. section 2000e et seq. was made by the United States Department of Justice on February 21, 1973. The issuance of that notice is therefore obviously a transaction, occurrence or event transpiring after filing of plaintiff's complaint, as classified in Rule 15(d) above-quoted. Thus under that Rule this Court holds discretion to permit or refuse filing of a supplement to plaintiff's complaint, which supplement would present the aforesaid post-filing transaction, occurrence or event. See Supplement to Complaint, filed herewith.

II. This Court Should Permit Plaintiff to File Said Supplement to Her Complaint in This Case.

Plaintiff took all steps necessary to prompt issuance of notice of her right of action against defendants herein under 42 U.S.C. 2000 e et seq.; unlike parties in other Title VII actions who forewent the step of applying for such notice from the relevant federal agencies, plaintiff took that step on January 12, 1973. *See* extensive discussion of this matter at pages 3-6 of Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss Civil Action; *see also* Exhibit "C" thereto appended. It would be contrary to the remedial purposes of Title VII of the Civil Rights Act of 1964 to deny plaintiff this opportunity to "perfect" this Court's jurisdiction over the claims of plaintiff based upon that Act by filing of the aforesaid supplement to her complaint. Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258, 260 (4th Cir. 1972); Stebbins v. Continental Ins. Co., 442 F.2d 843, 845-846 (D.C.Cir. 1971).

III. Rule 118(b) of the Local Rules of Practice for This District Permits This Court to Allow Plaintiff to File and Serve the Said Supplement to Her Complaint Without Filing the Supplemental Complaint in Its Entirety.

This Court is empowered to permit plaintiff to supplement her complaint without requiring plaintiff to file an entire supplemental complaint. Rule 118(b) of the Local Rules of Practice for this District appear to so provide. Plaintiff respectfully requests that, in consideration of the length of plaintiff's complaint with exhibits appended and of the inconvenience and expense of filing a supplemented complaint in its entirety, this Court permit supplementation of the complaint in the instant case by filing of the supplement to the complaint and stamping of the original complaint "supplemented".

Mary C. Dunlap

Dated: April 22, 1973

[U.S. District Court title omitted in Printing]

ANSWER AND DEMAND FOR TRIAL BY JURY

Come now the Richmond Unified School District, a political subdivision and agency of the State of California; the Governing Board of the Richmond Unified School District, sued herein as the Richmond Board of Education; and W. W. Snodgrass in his official capacity as Superintendent of Schools of the

Richmond Unified School District; each for himself or itself and not one for the other, and answer the complaint on file in the above-entitled action, as follows:

I

Answering Paragraph I, deny the allegations contained therein.

II

Answering Paragraph II, admit the allegations contained therein.

III

Answering Paragraph III, deny the allegations contained therein.

IV

Answering Paragraph IV, admit the allegations contained therein, excepting that the District operates schools *in* and not *of* the City of Richmond.

V

Answering Paragraph V, admit the allegations contained therein, excepting that the name of the defendant sued as the Richmond Board of Education is Governing Board of the Richmond Unified School District.

VI

Answering Paragraph VI, deny the allegations contained therein.

VII

Answering Paragraph VII, admit that Exhibit A to the complaint sets forth Section 131.10 of the regula-

tions of the Richmond Unified School District, lawfully adopted by the Governing Board thereof, and except as so admitted, deny the allegations contained therein.

VIII

Answering Paragraph VIII, admit the allegations contained therein.

IX

Answering Paragraph IX, admit the allegations contained therein.

X

Answering Paragraph X, admit the allegations contained therein.

XI

Answering Paragraph XI, admit the allegations contained therein.

XII

Answering Paragraph XII, admit that on December 27, 1973, Sam Teese as Assistant Superintendent of Personnel of the Richmond Unified School District, sent a letter to Mrs. Sonja Berg, a copy of which is attached to the complaint as Exhibit G, and that on or about January 10, 1973, Sam Teese received an undated letter from Mary C. Dunlap, purportedly an attorney for Sonja Berg, a copy of which is attached to the complaint as Exhibit H, and except as so admitted deny the allegations contained therein; as to the allegations respecting Mrs. Dunlap's capacity as attorney for Sonja Berg, said denial is based upon lack of information or belief.

XIII

Answering Paragraph XIII, deny the allegations contained therein.

XIV

Answering Paragraph XIV, admit that the District directed plaintiff to see a district physician, as set forth in Exhibit G, and except as so admitted, deny the allegations contained therein.

XV

Answering Paragraph XV, deny the allegations contained therein.

XVI

Answering Paragraph XVI, deny the allegations contained therein.

XVII

Answering Paragraph XVII, deny the allegations contained therein.

Wherefore, Defendants pray:

1. That the above-entitled action be dismissed.

2. That plaintiff take nothing by the above-entitled action.

3. That the defendants have judgment for their costs of suit.

4. For such other relief as the Court may deem just and proper.

John B. Clausen
County Counsel

(Jury Demand omitted)

[U.S. District Court title omitted in Printing]

OPPOSITION TO MOTION TO FILE SUPPLEMENT TO COMPLAINT

Come now defendants Richmond Unified School District, the Governing Board of the Richmond Unified School District (sued herein as the Richmond Board of Education), and W. W. Snodgrass as Superintendent of Schools of the Richmond Unified School District, and oppose the pending motion of plaintiff for leave to file a supplement to her complaint, and pray that said motion be denied.

I

The Purpose of a Supplemental Complaint Is Not to Correct Deficiencies of the Original Complaint, But to Bring a Controversy Up to Date and to Introduce Newly-Occurring Facts Which Enlarge or Change the Relief Sought.

The purpose of a supplemental complaint is to bring a dispute up to date (*City of Texarkansas v. Arkansas Louisiana Gas Co.,* 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598 [1939]) and to introduce new facts which enlarge or modify the relief sought in the original complaint (*Southern Pac. R.R. v. Conway,* 115 F.2d 746 [9th Cir. 1940]; *Brotherhood of Locomotive Firemen & Enginemen v. Butte, Anaconda & Pac. Ry.,* 286 F.2d 706 [9th Cir. 1961], cert. den. 366 U.S. 929, 81 S.Ct. 1650, 6 L.Ed.2d 388 [1961]).

However, that is not the purpose of plaintiff's proposed "Supplement To Complaint." The proposed

Supplement purports to state an event which admittedly took place on 21 February 1973 (after the filing of the original complaint on 5 February 1973), but the event of transaction alleged is one which is a precondition to the original filing. The proposed supplement does nothing to bring the controversy up to date or to enlarge the relief sought.

Obviously, plaintiff hopes improperly to use this Supplement to correct the deficiencies in her complaint as to the alleged violation by defendants of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §2000e et seq.).

II

The Proposed Supplement to Complaint Fails to Cure the Defects of the Original Complaint and Adds Nothing to Plaintiff's Alleged Claim.

It is defendants' contention that plaintiff has failed to state a claim upon which relief can be claimed under the Civil Rights Act and that the proposed Supplement does not cure the defects. Defendants have previously filed substantial arguments and authorities on this point as to the original complaint (Points and Authorities In Support of Motion to Dismiss, pp. 1-3, filed on 22 March 1973); the same arguments and authorities are applicable to the proposed Supplement, for as of the date the complaint was filed the jurisdictional prerequisites had not been met. That is to say, there is no allegation, either in the complaint or in the proposed Supplement, that the claim

plaintiff had presented to the EEOC is the same as the present action.

For the reasons stated, defendants respectfully ask that the Court deny plaintiff's motion for leave to file the proposed Supplement to Complaint.

John B. Clausen
County Counsel

[U.S. District Court title omitted in Printing]

NOTICE OF MOTIONS AND MOTIONS TO DISMISS

To: Sonja Lynn Berg and to Mary C. Dunlap, her attorney:

Please Take Notice that on Monday, 18 June 1973, in the courtroom of the Honorable Alfonso J. Zirpoli at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, at 1:30 p.m. or as soon thereafter as counsel may be heard, defendants Richmond Unified School District, the Governing Board of the Richmond Unified School District sued herein as the Richmond Board of Education, and W. W. Snodgrass as Superintendent of Schools of the Richmond Unified School District, will and do hereby move this Court as follows:

I

Said defendants move to dismiss the action on the ground that the court lacks jurisdiction of the subject matter, insofar as the action is predicated upon 42 U.S.C. §2000e et seq., on the ground that plaintiff has

failed to obtain a notice of right to sue prior to filing suit, as required by 42 U.S.C. §2000e-5(f).

II

Said defendants move to dismiss the action on the ground that the complaint, as amended and supplemented, fails to state a claim upon which relief can be granted, in that insofar as the action is predicated upon 42 U.S.C. §2000e et seq., the complaint, as amended and supplemented, fails to allege that plaintiff has first commenced proceedings under the California Fair Employment Practice Act (Cal. Labor Code §1410 et seq.) or the Equal Employment Opportunities Act, regarding the subject matter of the present suit, or that the Attorney General has first given notice allowing a civil action regarding the subject matter of the present suit, as required by 42 U.S.C. §2000e-5(f).

Said motions are made under Rule 12 of the Federal Rules of Civil Procedure and are based upon this notice of motions, the proposed order attached hereto, the points and authorities filed herewith, and all the pleadings, records and papers on file in said action or submitted in support hereof.

John B. Clausen
County Counsel

Lodged 6/25/73

In the United States District Court
Northern District of California

No. C-73-0192-AJZ

Sonja Lynn Berg, etc.,
Plaintiff,

vs.

Richmond Unified School District,
et al.,
Defendants.

ORDER ON MOTION TO SUPPLEMENT COMPLAINT

The motion of plaintiff for an order under Rule 15(d) of the Federal Rules of Civil Procedure and under Rule 118(b) of the Local Rules of Practice for the Northern District, giving leave to plaintiff to file and serve supplementation to her Complaint and to file and serve said supplement only, having been duly heard, and the Court being fully advised,

IT IS ORDERED that plaintiff's motion for leave to supplement her Complaint, by filing and service of said supplement only, be and the same is hereby granted.

Dated: June 6, 1973

Alfonso J. Zirpoli
United States District Judge

[U.S. District Court title omitted in Printing]

SUPPLEMENT TO COMPLAINT

After line eleven (11) of page six (6) of plaintiff's Complaint in the above-entitled action, the said Complaint is supplemented to include the following:

> "On February 21, 1973, the right of plaintiff to maintain this action under 42 U.S.C. 2000e et seq. was noticed by letter from the United States Department of Justice. A copy of said letter is hereto attached, marked "Exhibit AA", and is incorporated herein by reference."

"Exhibit AA"

Feb. 21 1973

JSP:BKL:dcr
DJ 169-11-0

Mrs. Sonja Berg
1139 Wllow Street, Apt. 2
Pinole, California 94564

Re: EEOC Charge Against Richmond Unified School District, No. TSF 3 0929

Dear Mrs. Berg:

Because you have filed a charge against the respondent named above with the Equal Employment Opportunity Commission, and the Commission has determined that it will be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge, and this Department has determined that it will not file any lawsuit based upon that charge within that time and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against the above named respondent.

The civil action must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security.

In order to apply for an appointed attorney, you may take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court for the Northern District of California located in San Francisco.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, at 1905 Market Street, San Francisco.

We request that you send this Department a copy of any complaint initiating suit.

Sincerely,
J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

By: BRIAN K. LANDSBERG
Chief
Education Section

cc: EEOC District Office
San Francisco, California

Mary C. Dunlap, Esquire
Napa, California

[U.S. District Court title omitted in Printing]

STATEMENT IN OPPOSITION TO MOTIONS TO DISMISS CIVIL ACTION

Plaintiff Sonja Lynn Berg will and does hereby oppose the motions of defendants Richmond Unified School District, et al. to dismiss the above-entitled action, as follows:

I. Plaintiff opposes the motion of defendants to dismiss the action on the alleged ground of lack of jurisdiction due to past-filing issuance of the letter-to-sue, on the grounds that this Court has already determined this issue against defendants and on the further ground that the letter-to-sue issued to plaintiff on February 21, 1973 was timely and properly issued by the United States Department of Justice.

II. Plaintiff opposes the motion of defendants to dismiss the action on the alleged ground of plaintiff's purported failure to exhaust prescribed state and federal administrative remedies under 42 U.S.C. Code 2000e et seq. on the ground that said allegation is factually insupportable, and on the further ground that defendants have already received adverse ruling on certain parts of said objection, and on the final ground that alleged failures of administrative agencies to fulfill their maximum responsibilities under Title VII cannot impair plaintiff's right of action, nor this Court's power to hear said action, under 42 U.S. Code section 2000e et seq.

Said opposition of plaintiff is made pursuant to sections (c) and (d) of Rule 114 of the Local Rules

of Practice in and for the United States District Court for the Northern District of California. Said opposition by plaintiff is and will be based upon this statement of opposition, the proposed order attached hereto, the memorandum of points and authorities herewith filed, and the pleadings, records, and papers on file in the above-entitled action.

Mary Cynthia Dunlap,
Attorney for Plaintiff

[U.S. District Court title omitted in Printing]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To Richmond Unified School District, Richmond Board of Education, W.W. Snodgrass, Superintendent of Education in his official capacity, and to their attorneys of record, Messieurs Arthur Walenta and Silvano Marchesi, Deputies County Counsel for Contra Costa County:

Please Take Notice that plaintiff will bring on for hearing, in the Courtroom of the Honorable Alfonso J. Zirpoli, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California on the 13th day of August, 1973, at 1:30 p.m. o'clock, or as soon thereafter as counsel can be heard, the following motion for summary judgment:

Plaintiff moves this Court as follows:

That this Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judg-

ment, on behalf of plaintiff and all other persons similarly situated, for the relief demanded in plaintiffs' complaint on the ground that there is no genuine issue as to any material fact and that plaintiff and all other persons similarly situated are entitled to a judgment in their favor as a matter of law.

This motion is based upon the Memoranum of Points and Authorities in Support of Summary Judgment, hereto appended, the Motion for and Memorandum in Support of Preliminary Injunction, the Order and Opinion Upon Preliminary Injunction, and the Complaint and Answer, in *Berg v. Richmond Unified School District, et al.*, C-73-0192-AJZ.

Mary C. Dunlap

Dated: 4 July 1973

[U.S. District Court title omitted in Printing]

STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to the requirements of Rule 118 of the *Local Rules of Practice* of the United States District Court of California, counsel for plaintiff submits the within statement as to the genuineness of issues of material fact in the instant controversy.

There are no material facts in the instant controversy as to which there is a genuine dispute. By their Answer defendants have admitted:

(1.) that plaintiff Sonja Lynn Berg was a schoolteacher employed by the defendant District at all

times relevant to the Complaint of plaintiff (see Answer of Defendant's, p.1 at lines 29-30);

(2.) except for a prepositional "correction", that defendant District is responsible for the operation of the public school system in Richmond, County of Contra Costa, California (see Answer, p.2 at lines 6-8);

(3.) that the "Governing Board of the Richmond Unified School District", sued by plaintiff under the title "Richmond Board of Education", is the body vested with responsibility for primary and secondary education of defendant District (see Answer, p.2 at 11-14);

(4.) that Section 131.10 of the regulation of defendant District, which compels female employees to take leave upon the commencement of the seventh month of pregnancy, was adopted by defendant Board (see Answer, p.2 at lines 21-25);

(5.) that defendants have denied and continue to deny accrued sick pay to pregnant female employees including plaintiff, and that said denial is accomplished by unwritten policy of defendants (see Answer, p.2 at lines 28-29);

(6.) that defendants' "interim" maternity leave policy was adopted on December 13, 1972, which policy permits any exceptions by approval of defendants to the seventh-month leave compulsion (see Answer, p.2 at lines 32-);

(7.) that defendants or their agents have attempted to apply a maternity leave policy, which differs from

a policy that permits the individual employee and her physician to decide when leave should commence, to plaintiff herein (see Answer, at p.3, lines 2-3, 6-7, and 10-13); and

(8.) that defendants directed plaintiff to see a physician selected by defendant District in relation to her maternity leave request (see Answer, p.3 at lines 27-28).

By their Answer to plaintiff's Complaint defendants in the instant action have admitted every fact that is material to the establishment of plaintiff's claims under 42 U.S. Code section 2000e et sq. and under 42 U.S. Code section 1983. Defendants' denials in their Answer go to the *legal* allegations of the aforesaid Complaint, *to wit.*, that the defendants' discriminatory maternity leave and sick pay policies violate the rights of plaintiff and her purported class under the above-cited statutes (see Answer, at P.1 lines 26; p.2 lines 2-3, 17-18, 24-25; p.3, lines 23-24 and 32; p.4, lines 2-3, 6-7).

Therefore, the real issues of this case are susceptible to determination by this Court as matters of law. As more extensively presented in Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, herewith submitted, those questions of law should be resolved in plaintiff's favor in the instant action.

Mary C. Dunlap

Exhibit "A"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SONJA LYNN BERG IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Mrs. Sonja Lynn Berg, being duly sworn, deposes and says:

I am a schoolteacher employed in the Richmond Unified School District. On December 1, 1972 I informed my employer that I wished to take maternity leave commencing on March 23, 1973. At that time, my employer informed me that I would have to return to work on or before May 1, 1973 if I wished to be permitted to continue teaching during this school term.

On the evening of March 14, 1973, after a regular day's work of teaching, I gave birth to my first child. My recuperation has been normal, so far as I know.

On May 1, 1973, *I was not yet ready* to return to teaching, so I did not return to teaching during the aforesaid school term. I plan to return to teaching on the first regular work day of the fall semester of 1973.

Mrs. Sonja Lynn Berg

Dated: 7-12-73

(jurat omitted)

Exhibit "B"

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF DR. ROBERT TOMFOHRDE, IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DR. ROBERT TOMFOHRDE, being duly sworn, deposes and says:

I am a medical doctor.

On March 14, 1973, my patient, Sonja Lynn Berg, gave birth to a male infant, who weighed six pounds and five ounces at birth. Both Mrs. Berg and her baby son were in good health, at the date of their last examination on June 15, 1973, Mrs. Berg and March 23, 1973, baby.

Dr. Robert Tomfohrde, M.D.

(jurat omitted)

ORDER DENYING MOTION TO DISMISS
(Petition for Writ of Certiorari, Appendix C, pg. 35)

[U.S. District Court title omitted in Printing]

STATEMENT ON ISSUES OF MATERIAL FACTS; CROSS-MOTION FOR SUMMARY JUDGMENT; AFFIDAVIT OF FLOYD LARSON; AFFIDAVIT OF SILVANO MARCHESI; POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Statement on Issues of Material Facts

Pursuant to Rule 118(a) of this Court's Local Rules of Practice, defendants submit the following statement as to the issues of material facts in the present case.

The following facts material to the disposition of plaintiff's motion for summary judgment remain in issue:

(1) Whether defendants have at all pertinent times enforced Section 131.10 of the district's rules and regulations. (Complaint, Paragraph VII; Affidavit of San Teese In Opposition To Motion for Preliminary Injunction, filed 20 February 1973, #3; Answer, Paragraph VII)

(2) Whether "pregnancy is the sole disability for which the district requires an employee to take a leave of absence even when the employee and attending physician do not deem it necessary." (Affidavit of Sam Teese In Opposition To Motion For Preliminary Injunction, filed 20 February 1973, #5; Order Granting Motion For Preliminary Injunction, entered 22 February 1973, p.4, ll. 18-21)

(3) Whether "only a person who is pregnant is forced to submit to an examination by the school district's doctor in order to continue working." (Complaint, Paragraphs XIII and XIV; Affidavit of Sam Teese In Opposition To Motion For Preliminary Injunction, filed 20 February 1973, #5; Order Granting Motion For Preliminary Injunction, entered 22 February 1973, p. 4, ll. 21-23)

(4) Whether plaintiff has suffered any damages because of defendants' policies and practices. (Complaint, Paragraph XVII; Answer, Paragraph XVII)

Defendants submit that the above factual issues are material to the disposition of plaintiffs' motion for summary judgment and of the case in general, for if they are resolved in favor of the defendants, plaintiff has completely failed to prove discrimination against her based on her sex. As such, the above factual issues preclude the disposition of plaintiff's motion solely on basis of legal arguments.

Cross-Motion For Summary Judgment

Even if the Court were to find there were no material facts in issue in this case, defendants contend that plaintiff is not entitled to a summary judgment as a matter of law, as set forth in the Opposition below. On the contrary, assuming such a finding by the Court, defendants will move the Court for a summary judgment in favor of defendants herein dismissing the action. Said *motion will be based on* this Opposition to plaintiffs' motion, on the Affidavit of Floyd Larson, and *on all the pleadings and proceedings heretofore had herein.*

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF FLOYD LARSON IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Floyd Larson, being duly sworn, deposes and says:

1. I am the Assistant Director of Personnel for the Richmond Unified School District.

2. To my knowledge, Sonja Berg has not requested to return to her duties as a certificated employee of said district since the birth of her child on or about 14 March 1973.

3. To my knowledge, Mrs. Berg has not indicated to district personnel that she intends to return to her duties as of the beginning of the 1973-1974 school year.

4. To my knowledge, since 3 February 1973 I have not told Sonja Berg that if she did not return to her duties by 1 May 1973 she could not return before the ensuing 1973-1974 school year.

5. I am not aware of any district rule, regulation, policy, or practice prohibiting a return to duties between 1 May and the end of the school year.

Floyd Larson

(jurat omitted)

[U.S. District Court title omitted in Printing]

AFFIDAVIT OF SILVANO MARCHESI IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Silvano Marchesi, being duly sworn, deposes and says:

1. I am an attorney at law, licensed to practice in all the state courts of the State of California and admitted to practice before this Court.

2. I am one of the attorneys representing the defendants herein.

3. On 18 June 1973 I visited the Regional Office of the Equal Employment Opportunities Commission at 1095 Market Street, San Francisco, California.

4. Upon my request, I was allowed to inspect the file relating to Charge No. TSF 3 9029. Said file contained the Charge, with copies of the Richmond Unified School District's Rules Nos. 131.06, 131.07, 131.10, and 131.11 attached; a Notice of Charge of Employment Discrimination and various letters and memoranda pertaining to said Charge.

5. Upon my further request, I was furnished copies of a portion of said file.

6. Attached hereto as Exhibit A is an accurate and true copy of Charge No. TSF 3 9029, furnished to me by the Regional Office of the EEOC on said date.

Silvano Marchesi

(jurat omitted)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used by to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

10:5 A.M. SAN FRANCISCO, CALIF.

NOV 17 1972

Case File No. 15F 3-0929

(PLEASE PRINT OR TYPE)

AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

1 Your Name (Mr., Mrs., Miss) Mrs. Sonja Berg Phone Number 758-4927

Street Address 1139 Willow Street, Apt. 2

City Pinole State California Zip Code 94564

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☒

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Richmond Unified School District

Street address 1108 Bissell Avenue

City Richmond State California Zip Code

AND (other parties if any)

W. W. Snodgrass-Superintendent
1108 Bissell
Richmond phone 234-3825

Mr. Sam Teese-Asst. Supt. Personnel
1108 Bissell
Richmond phone 234-3825

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ (MONTH) ____ (DAY) ____ (YEAR) No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☐

6 The most recent date on which this discrimination took place: Month ____ Day ____ Year ____

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I am a kindergarten teacher in the Richmond Unified School District. My husband is presently a full-time student. I am pregnant and was planning to work until my delivery date or as long as possible. My doctor and I feel that there is no medical or personal reason why I should not be able to. But according to school district regulations, I must request a "maternity leave" commencing no later than the start of the seventh month of pregnancy which is only 5 weeks away. In addition, I have 27 days sick leave which I will not be paid for under regular sick days or emergency leave policy. Up to this point, I have had no written correspondence with the district concerning this matter. Together with my husband, I am frantic over our impending financial crisis which is the result of the discriminatory practices of the school district. (See Title 29, Labor, Chapter XIV, Part 1604, Sec. 1604.10)

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 11/15/72 Sonja Berg (Sign your name)

Subscribed and sworn to before me this ____ day of ____ 196 ____

(Name) (Title)

If you want for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you get sworn to.

FORM DIR. OF BUDGET—No. 124–R0001

EXHIBIT A

BEST COPY AVAILABLE

EEOC-5 (REV. 7-68)

Exhibit "A"

RICHMOND UNIFIED SCHOOL DISTRICT
REQUEST FOR MATERNITY LEAVE

By Board of Education adoption, the following regulations shall apply to certificated maternity cases:

1. In case of expected maternity, a leave must be requested.
2. The leave must commence no later than the start of the seventh month of pregnancy.
3. The request for leave must include a doctor's statement regarding the expected date of confinement.
4. The request must include a projected date for termination of the leave.

Personnel
1-4-72

. . .

Section 131.07 Health and Injury

1. Health Leave
   - 1.1 Any certificated employee classified as a permanent employee may be granted an extended leave of absence with or without use of pay at discretion of employee for purposes of health, rest and recuperation. Extended leave may be granted for a six months or one-year period to correspond as nearly as possible with the schedule of the school year.
   - 1.2 Upon request of the Superintendent, the employee shall provide a health affidavit

from a licensed physician to verify the need for the requested health leave.

1.3 Prior to the granting of a health leave, the Governing Board may require a physical examination to be performed by a physician selected by the Governing Board. Such examination shall be at no cost to the employee.

2. No salary or sick leave deduction is made for absence due to contagious disease, which may be presumed to have been contacted during the performance of school duties with other persons having a contagious disease, for the period of isolation or quarantine.

3. Full time certificated personnel shall be allowed absence from duty because of personal illness or injury for ten (10) full days each school year without loss of salary. Unused days of such leave shall be accumulative with a maximum of ten (10) days per year allowable. (Educational Code Sec. 13468).

4. Personal illness of more than five (5) school days duration shall be verified by a certificate from a licensed physician. Such certificate shall be given to the Principal who shall in turn forward said certificate to the School Health Department.

5. Beyond the number of days of absence allowed for personal illness or injury with full salary, full time certificated employees shall be allowed their regular salary, less the cost of a substitute, for a period of five (5) school months, exclusive of those days in which full salary was allowed. (Education Code, Section 13456). If the difference is less than $3.00 per day, a

minimum of $3.00 per day shall be paid the absent employee. The Governing Board will not allow any difference in salary of substitute, and salary of regular employee beyond the five school month period.

. . .

Section 131.10 Maternity and Paternity Leaves

1. In all cases of expected maternity of a permanent certificated employee, the employee must secure an extended leave of absence. This leave must become effective no later than the start of the seventh month of pregnancy.

2. Maternity leave may be terminated by the individual teacher by presenting a statement from a physician that the individual is physically and mentally able to resume teaching. The certificated employee shall give a minimum of 30 days notice of intent to return.

3. In case of adoption of an infant, the mother will be allowed maternity leave if she requests such leave.

4. Paternity leave of one (1) day may be granted the male employee without loss of pay during or immediately after the confinement of his wife. In cases of adoption of an infant, the same regulations will apply as in the case of a natural birth.

. . .

REPORTER'S TRANSCRIPT:

Hearing on Motion for Summary Judgment:

[40] *MONDAY, AUGUST 20, 1973*

THE CLERK: Civil Case 73-0192, Berg, et al., versus Richmond Unified School District, et al., motion for summary judgment and motion to certify class.

Counsel please state their appearance for the record.

MS. DUNLAP: Mary Dunlap for the plaintiff and moving party.

MR. MARCHESI: Silvano Marchesi, Deputy County Counsel for the respondents.

THE COURT: Are you prepared to submit the motion? You have motion for summary judgment and motion to certify class.

MS. DUNLAP: I would have but two rather brief points to make, one on each of those two motions, Your Honor, as soon as I find the paper.

On the issue of the size of this class, there is some slight factual discrepancy as between the affidavit on plaintiff's behalf and the facts as to the size of the class alleged by the counsel for the defendant.

THE COURT: Well, the question is, if there is a class action, who shall be included in the class?

MS. DUNLAP: I believe that's so, Your Honor.

THE COURT: Well, if I were to find a class action, I would apply it prospectively only, I can tell you that now.

[41] MS. DUNLAP: I take it from that observation your reading of Mather is that the line——

THE COURT: My reading of it is that . . . I don't know how many there are, but there doesn't

appear to be more than possibly a dozen involved. The class is not that numerous, and it's not so sure, as far as your client is concerned, in view of the rulings I may make, that your client is necessarily representative of that class. For all those reasons, if I were to find a class action, I would narrow it in the manner in which I have indicated. And that would be a relatively simple thing to do. There are no damages involved, it's a question of prospective application. So that that type of narrowing of the class may be appropriate, to include those who are not that numerous and in my view may not be an appropriate disposition of the request for class action under the rule.

What was the next thing you wanted to comment on?

MS. DUNLAP: Well, my other comment has to do with the motion for summary judgment. If I understand Your Honor on the issue of the class, I would think that the main question remaining would be whether the prospectively identified class were, in the instance that our motion for summary judgment is granted—whether the remedy to that class were under Title 7 a declaratory judgment or injunctive relief. And I would point out in that regard that the complaint asks for an [42] injunction, but that if it is Your Honor's view that the sick pay accrual policy is in violation of Title 7, perhaps declaratory relief declaring that unwritten policy, as defendants have admitted it to be, to be invalid under Title 7, would be the most appropriate form of relief, as opposed to an injunction which would necessarily have to be

mandatory in form, compelling the defendants to pay accrued sick leave to the prospectively identified class. So that in that respect I would ask that, to the extent necessary to be procedurally sound, the complaint be amended to include whatever is necessary for a showing for declaratory relief. My understanding is simply that the meaning of Title 7 through Section 2008(5), I believe it is, that identifies the forms of remedy available to the Court in a Title 7 action, would cover that instance; but if there's a procedural defect in that respect, I would ask that we have leave to do that, to suit this motion and this class itself to the remedy.

THE COURT: Well, you are trying to bring the class under 1983, aren't you?

MS. DUNLAP: The prospectively identifiable class I think is defined through Title 7.

THE COURT: You want to make some comment on that? What about the summary judgment as to the individual claim?

MR. MARCHESI: Are you referring the question to me, Your Honor?

[43] THE COURT: Yes. Shouldn't I enter it?

MR. MARCHESI: I don't think Your Honor should enter it. I don't think that it qualifies as .... Now you are getting to the merits of the summary judgment on the 1983 claim, is that correct?

THE COURT: Well, a Title 7 claim for summary judgment.

MR. MARCHESI: Well, as I understand it, the summary judgment would apply to both grounds for

the action, both bases for the action, a claim for summary judgment under both 1983 and Title 7.

MS. DUNLAP: I have attempted insofar as it was possible, Your Honor, to make it clear that I view Your Honor's prerogative under Title 7 as being actually sufficient to afford the plaintiff relief here, so that summary judgment on 1983 grounds would simply be unnecessary as a legal matter, for the reason that Title 7 itself is fully descriptive of the rights and remedies of the parties here, insofar as the individual relief to the plaintiff is concerned.

MR. MARCHESI: If the case is to be presented, or if this motion is to be presented as a Title 7 motion for summary judgment, then the respondents would oppose it for all the reasons set forth in the——

MS. DUNLAP: It was clearly noticed as a motion for Title 7 relief, Your Honor, and has been docketed through the [44] memorandum of points and authorities on that issue. So if counsel for defendant wish to answer it, he had the opportunity to do so. It was made clear that Title 7 was being relied on for purposes of summary judgment.

MR. MARCHESI: Opposition to that motion on that basis was submitted.

MS. DUNLAP: So your opposition has been made?

MR. MARCHESI: That's correct.

MS. DUNLAP: I was confused as to what you were saying.

On the summary judgment, Your Honor, I would emphasize defendant has set forth for supposed issues

of material fact in reply to this motion, no one of which is an issue of material fact. Now, if Your Honor would like me to describe why, I would be willing to do that. But each of these things has come up before.

The first position is essentially on the issues of fact, whether they really have this policy that we have been litigating all this time. It is fairly irrelevant to the Court's conclusion whether it's Section 131.90 or an interim policy with interim exceptions being enforced, insofar as the plaintiff's challenge to the principle and the defendant's drawing of a compulsory line, with whatever exceptions, District positions or otherwise is concerned. So there's not an issue of material fact.

[45] Then there is the business of whether the section has been regularly enforced. Well, that's irrelevant, and the section has been enforced insofar as this individual plaintiff is concerned frequently enough to infringe upon the rights of plaintiff and others similarly situated under Title 7. So there's not an issue of fact either.

Then there is a question raised in the third point of defendant's list of purported issues of fact as to whether any group other than pregnant females must show doctors they can go on working or must be susceptible to certain kinds of leave. No such group is defined by any regulation or any policy or any practice of defendants. They have not said all people having heart attacks or tonsillitis or any other thing you want to name must go through a District physi-

cian in order to establish their exceptions to a rule about hernia patients or tonsillectomies or whatever. They do that with pregnant women, but with no other health-identifiable group other than pregnancy.

Finally, they say there's an issue of fact as to whether plaintiff has suffered damages. The confusion, I suppose, in that respect arises from the fact that plaintiff did allege that there were damages to be proved in accordance with proof in the complaint. Perhaps that's what they were referring to. Title 7 essentially spells out the sick pay accrual question here as a form of equitable relief, so that **[46]** there, I think, it might just be a misunderstanding between us. Sick pay accruals are not technically a form of damages under Title 7, they are a form of equitable relief, so in that regard there's no issue of fact either.

No issues of fact remain, the issues of law have been clarified by a long series of motions in this case, and I think that on that ground I would be ready to submit the question.

MR. MARCHESI: Your Honor, I think any response that I would make to the comments made by Ms. Dunlap are adequately set forth in the points and authorities already submitted, with one possible exception. In the latest papers filed by the plaintiff, reference is made to the rational basis test versus the strict scrutiny test to be applied in this case, and I would refer the Court, or invite the Court's attention, to the decisions in the Reed case, the Frontiero (phonetic) case by the Supreme Court and the Aiello (phonetic) case recently out in the District Court.

THE COURT: Yes, I am familiar with it.

MR. MARCHESI: Very well. Then I would have no further comment and would submit the case.

THE COURT: Well, I'll file a memorandum opinion. But since I propose to file a memorandum opinion, I might as well tell you now at least what the order will be. The plaintiff's motion for summary judgment is granted. Well, this **[47]** is basically Part 7. The defendant's motion for summary judgment is denied. Plaintiff's motion for a class action certification is granted in part and denied in part. Plaintiff is designated as representative of all female permanent certificated employees of the defendant District who will be discriminated against on account of sex by the District's policy regarding maternity leave and accrued sick pay benefits to pregnant employees, and she may prosecute this action on behalf of that class.

The defendant, their agents and successors, are permanently enjoined from denying plaintiff such accumulated sick leave compensation as she is entitled to receive for the period for which she is physically incapacitated and immediately unable to work because of the effects of her pregnancy and delivery. Defendants, their agents and successors, are permanently enjoined from adopting or enforcing policies or practices, formal or informal, involving such matters as commencement and duration of leave, reinstatement and payment under any health or temporary disability insurance or sick leave plan, which apply to disability due to pregnancy or child birth, or different terms and conditions than they apply to other temporary disabilities.

Plaintiff's attorney shall submit an itemized request for reasonable attorneys' fees, and plaintiff shall submit a judgment in accordance with the order that I have just **[47-A]** entered and in accordance with the requirements of Local Rule 123.

Now, it may be quite a few days before this formal opinion comes out, because I have a big backlog. All right.

MR. MARCHESI: Thank you, Your Honor.

MS. DUNLAP: Very well, Your Honor.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT
(Petition for writ of certiorari, Appendix C, pg. 39)

JUDGMENT
(Petition for Writ of Certiorari, Appendix C, pg. 46)

OPINION, 9th CIRCUIT COURT OF APPEALS
(Petition for Writ of Certiorari, Appendix A, pg. 1)

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT, RICHMOND BOARD OF EDUCATION, and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other similarly situated female employees of the Richmond Unified School District,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

QUESTIONS PRESENTED

1. Does an employer's prohibition against use of accrued sick pay, by every employee who suffers a period of inability to work due to "normal" pregnancy, violate Title VII of the Civil Rights Act of 1964?

2. Is the issuance of a notice of right of action under Title VII an absolute jurisdictional prerequisite to the commencement of that Title VII action?

COUNTERSTATEMENT OF THE CASE

On November 15, 1972, plaintiff-appellee Sonja Lynn Berg was a pregnant schoolteacher, employed by defendant-appellant Richmond Unified School District (hereinafter, the "School District"). (CR 255.) The School District then had and enforced a policy that required every permanent certificated pregnant employee to commence "maternity leave", without availability of accrued sick leave pay, no later than the first day of the seventh month of her pregnancy. (CR 10, 180 at ¶VIII.) On November 15, 1972, Mrs. Berg filed a written charge with the Equal Employment Opportunity Commission (hereinafter, the "EEOC"), concerning the application of the aforesaid policies to her as a pregnant employee. (CR 255.)

On December 15, 1972, defendant-appellee Richmond Board of Education (hereinafter, the "Board") adopted a so-called "interim" maternity leave policy, instructing its Assistant Superintendent to consider individual requests for "exceptions" from the seventh-month line, and empowering him to reject such requests regardless of the requesting employee's own doctor's advice. (CR 11-14.) On or about December 20, 1972, Mrs. Berg presented a request for an "exception" from the seventh-month line, accompanied by her physician's written statement, which provided:

> "Mrs. Berg's estimated date of confinement is March 24, 1973. Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973. If there is any additional information you need, please contact this office." (CR 16.)

In reply to Mrs. Berg's request, the Assistant Superintendent notified Mrs. Berg in writing that (1) she would be required to undergo a physical examination by a District physician, in order for there to be any chance that her leave would commence at the date that her own physician had advised (CR 18); and (2) the District reserved the "right" to reject its own physician's advice, if that physician recommended ". . . the extension of leave". (CR 18.) Counsel for Mrs. Berg sent a letter to the Assistant Superintendent on or about January 9, 1973, explaining that she believed the defendants' treatment of Mrs. Berg and other pregnant teachers violated relevant law, and urging that a non-discriminatory policy be adopted and applied. (CR 19-22.) No response to said letter was ever made. (Brief for Appellants To the Court of Appeals, for the Ninth Circuit, p. 9.)

On January 12, 1973, counsel for Mrs. Berg sent a written request to the EEOC, asking that it promptly issue to Mrs. Berg a notice of her right of action pursuant to 42 U.S. Code §2000e-5. (CR 124.) On February 5, 1973, an action pursuant to 42 U.S. Code §§1981, 1983 and 2000e et seq., and pursuant to the Fourteenth Amendment to the United States Constitution, was commenced on behalf of Mrs. Berg and a purported class in the United States District Court for the Northern District of California. (CR 1.)

On February 21, 1973, a notice of Mrs. Berg's right of action under Title VII was issued by the Department of Justice. (CR 200-201.) On February 22, 1973, after briefing and argument, District Judge Alfonso Zirpoli issued a preliminary injunction, enjoining the District, Board and Superintendent from compelling Mrs. Berg to take any leave other than a leave "when deemed necessary by [Mrs. Berg] and her physician." (CR 75.) The District Court grounded its finding of jurisdiction upon 42 U.S. Code §1983 and the Fourteenth Amendment. (CR 71-75.)

On or about March 16, 1973, so-called "revised interim provisions for *exceptions* from maternity leave policy" were issued by the Superintendent and Assistant Superintendent. (CR 44.) In their petition for certiorari, defendants-petitioners Board et al. present the above "exceptions" under the label "Richmond Unified School District Interim Maternity Leave Policy" (Petition for Certiorari, Appendix E, pp. 60-61). In fact, however, the School District's so-called "interim" policy was established on December 13, 1972, in direct reference to the mandatory seventh-month line. (CR 11-14.) The "revised interim provisions for *exceptions* to maternity leave" (CR 44) adopted in March, 1973 referred back to the December 13, 1972 policy. (CR 10-14, 44.) In summary, as the District Court properly concluded below, the March 16, 1973 "exceptions" policy contained compulsions as to commencement of "maternity" leave. (CR 303-304.)

Upon a motion to supplement the Complaint, the District Court permitted filing of the notice of right

of action. (CR 197, 199-201.) The District Court's summary judgment in favor of Mrs. Berg and the class, entered on December 5, 1973, rests exclusively upon Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S. Code §2000e et seq. (CR 301-306, 326-327.)

REASONS FOR DENIAL OF A WRIT OF CERTIORARI

1. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S DECISION IN GEDULDIG v. AIELLO.

Respondent Mrs. Berg submits that the purported "conflict" between the Court of Appeals' decision in this case and this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), which petitioners School District et al. urge to this Court as grounds for issuance of a writ of certiorari, results from a logically unnecessary and legally hazardous construction of footnote 20 of this Court's opinion in *Geduldig v. Aiello.* The reading of footnote 20 of *Geduldig v. Aiello* urged by petitioners would undermine the basic prohibition, contained in Title VII of the Civil Rights Act of 1964, against sex-based discrimination in employment.

If the measure of unlawfulness of an employment practice under Title VII consisted in whether the applicant or employee affected thereby could prove it to be ". . . a mere pretext designed to effect an invidious discrimination against the members of one sex [race, color, national origin, religion][1] . . .",[2] then

---

[1] 42 U.S. Code §2000e-2 prohibits employment practices that discriminate on account of any of these classifications.

[2] *Geduldig v. Aiello,* 417 U.S. 484, 496 n. 20.

the well-established principle, that an employer's neutral or benign intent does not shelter discriminatory employment practices from challenge under Title VII, would be overturned. *See, e.g., Albermarle Paper Co. v. Moody,* 95 S.Ct. 2362, 2374 (1975); *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971). Furthermore, the basic burden of proof allocation under Title VII, outlined by this Court in its decision of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), would be inverted, or worse. That is, by the importation of the standard articulated in footnote 20 of *Geduldig v. Aiello* into the Title VII context, a policy or practice that in fact discriminates on account of sex could only be successfully challenged in the event that a plaintiff could prove that the *motive* underlying its design was sex-discriminatory.

In essence, petitioners seek to have this Court delete the term "sex" from Title VII, insofar as it encompasses employment practices that are not maliciously, consciously nor designedly sex-discriminatory. Respondent contends that neither any part of *Geduldig v. Aiello,* nor any of this Court's decisions interpreting Title VII, support such a drastic dilution of Title VII's prohibitions against sex-based discrimination in employment. Therefore, the purported "conflict" between the Court of Appeals' decision in this case and this Court's decision in *Geduldig v. Aiello* is needless; it does not provide grounds for issuance of certiorari.

2. THIS CASE PRESENTS NO JURISDICTIONAL ISSUE THAT IS WORTHY OF THIS COURT'S REVIEW

Respondent Mrs. Berg concedes that her signature upon her EEOC charge was not notarized.[3] On this basis alone, petitioners School District et al. argue that the said charge was not lawfully nor timely filed, and that the District Court was thereby deprived of jurisdiction as to Mrs. Berg's Title VII claims. This position on petitioners' part is a spurious one, raising no issue that is worthy of this Court's review. Petitioners School District et al. characterize the absence of notarization of Mrs. Berg's signature upon her EEOC charge as a deprivation of their "procedural protections" under Title VII. There is simply no merit to that characterization, because petitioners were in no fashion prejudiced by this technical flaw in the charge.

Petitioners' second "jurisdictional argument" is as frivolous as their first. In the Court of Appeals, petitioners School District et al. conceded that, upon the filing of Mrs. Berg's action alleging Title VII violations, the District Court had jurisdiction pursuant to Title VII to grant "temporary relief to maintain the status quo", on and after February 5, 1973 (Opening Brief of Appellants in the Court of Appeals for the Ninth Circuit, p. 15 (No. 74-1457)), despite the fact that Mrs. Berg's notice of right of action was not supplemented into her complaint until June 7, 1973. (CR 197, 199.) Yet petitioners seek to reopen

[3]However, Mrs. Berg *did* sign the oath upon the making of said charge, petitioners' representation to the contrary notwithstanding. (CR 255.)

this matter at this level, now contending that the Court of Appeals erred in its determination that, in extraordinary circumstances, a Title VII claimant may validly seek preliminary injunctive relief to prevent violation of his or her rights *prior* to the issuance of the party's notice of right of action. Respondent Mrs. Berg submits that the Court of Appeals' rulings as to the Title VII jurisdiction of the District Court are firmly grounded in precedent and in policy, and should not be disturbed by this Court. (Petition for Certiorari, Appendix A, pp. 6-7.)

---

3. CERTIORARI SHOULD BE GRANTED IN THIS CASE ONLY IF CERTIORARI IS GRANTED IN LAKE OSWEGO SCHOOL DISTRICT NO. 7 v. HUTCHISON.

Respondent Mrs. Berg concedes that, in the event that a writ of certiorari were granted upon the petition in *Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, certiorari would be warranted in this case as well, to the extent that the legality under Title VII of an employer's denial of accrued sick leave pay to women employees for period of disability from employment due to "normal" pregnancy is at issue in both cases. Respondent recognizes that a writ of certiorari must be granted, if this Court determines that there was error in the Ninth Circuit Court of Appeals' holding upon that issue.

However, petitioners School District et al. do not raise a reviewable issue concerning the Court of Appeals' holding that their compulsory maternity leave policies (as distinguished from their policy denying

accrued sick pay) violate Title VII. As petitioners have admitted to this Court, California Education Code §13456, effective January 1, 1976, prohibits the School District, Board and Superintendent from further enforcement of their compulsory maternity leave policies. (Petition for Certiorari, p. 8; and Appendix C, pp. 52-53.) Section 13456 provides in pertinent part that:

> ". . . [t]he length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician."
>
> (Appendix D, p. 52.)

As of January 1, 1976, California law squarely requires petitioners to do, and to refrain from doing, no more and no less than was ordered by the District Court below, with respect to the terms and conditions of leave of pregnant employees. (Compare, Petition for Certiorari at Appendix D, pp. 52-53; and, Judgment, CR 326-327.) Therefore, were this Court to grant certiorari and to vacate the judgment below, insofar as it prevents petitioners from having and enforcing any compulsory maternity leave policy of the sort prohibited by EEOC Guideline §1604.10, petitioners would gain no relief thereby, as to their legal duty with respect to leave policies affecting the class of female employees in this action. Petitioners must show, and they cannot show, that this Court's reversal of the judgment as to their leave policies under Title VII will prevent injury to them. *Massachusetts v. Mellon,* 262 U.S. 447 (1923). Nor can petitioners

show the requisite nexus between their status as litigants and the claim as to their leave policies which they present for review. *Flast v. Cohen,* 392 U.S. 83, 102 (1968). California law has disposed of petitioners' claim altogether and, unlike the situation that gave rise to the dissenting opinion in the case of *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), petitioners themselves have not been foreclosed from any potential relief to them by denial of certiorari, nor has argument been had, nor has a decision been rendered by this Court. *Rice v. Sioux City Memorial Park Cemetery, supra,* 349 U.S. 70, 80. Therefore, as to petitioners' claim that the Court of Appeals erred in upholding the trier's injunction, insofar as that injunction requires petitioners not to treat leaves due to pregnancy differently than other temporary disability leaves, respondent submits that the claim presented is non-justiciable; therefore, a writ of certiorari would not be proper as to said claim.

CONCLUSION

For the reasons presented hereinabove, respondent respectfully submits that a writ of certiorari should not be granted to review the decision of the Court of Appeals for the Ninth Circuit.

Dated, February 17, 1976.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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In the Supreme Court

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United States

OCTOBER TERM, 1976

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VS.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 528 F.2d 1208 and is appended to the petition for writ of certiorari as Appendix A. The decision of the United States Court of Appeals for the Ninth Circuit in *Hutchison v. Lake Oswego School District No. 7* is reported in 519

F.2d 961 and is appended to the petition for writ of certiorari as Appendix B. The opinions and the judgment of District Judge Alfonso J. Zirpoli are appended to the petition for writ of certiorari as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this case on December 9, 1975. Petition for certiorari was filed within 90 days of that date and granted on January 25, 1977, ..., U.S. ..... Petitioners invoke the jurisdiction of this Court under 28 USC Section 1254(1).

STATUTES INVOLVED

The primary statutes and regulations concerned in this case are 42 USC §2000e-2(a), 42 USC §2000e-5(b), 42 USC §2000e-5(e), 42 USC §2000e-5(f)(1), 42 USC §2000e-5(f)(2), 29 C.F.R. §1601.8, 29 C.F.R. §1601.25b(c), 29 C.F.R. §1604.10(b), California Education Code §13456, and California Education Code §13468. The text of these statutes and regulations is appended to this brief as Appendix A.

QUESTIONS PRESENTED

I. May an action under Title VII be maintained notwithstanding (1) that the statutory notice of the right to sue had not been received when the action

was filed and (2) that the underlying EEOC charge was defective?

II. Under Title VII of the Civil Rights Act must an employer pay sick leave for absences due to normal pregnancy and delivery?

III. Under Title VII of the Civil Rights Act is an employer prevented from making a factual, medically based determination as to the ability of a pregnant employee to continue working?

STATEMENT OF THE CASE

Sonja Lynn Berg was a teacher employed by the defendant Richmond Unified School District (hereafter "School District"). Prior to November 29, 1972, the School District maintained a maternity leave policy, authorized by California Education Code §13456, which provided for a mandatory leave of absence commencing no later than the seventh month of pregnancy, and did not allow the use of accumulated sick leave credits to permit pay during maternity leave (A. 7, 8, 87, 88; ¶VII, VIII).

On November 15, 1972, Mrs. Berg filed a charge of discrimination with the Equal Employment Opportunity Commission (hereafter EEOC) against the School District, W. W. Snodgrass, District Superintendant, and Sam Teese, Assistant Superintendent-Personnel. The charge purports to be under oath, but does not show that it was sworn to (A. 109). Mrs. Berg described her complaint as follows (A. 109), *emphasis added:*

"I am a kindergarten teacher in the Richmond Unified School District. My husband is presently a full-time student. I am pregnant and was planning to work until my delivery date or as long as possible. My doctor and I feel that there is no medical or personal reason why I should not be able to. But according to school district regulations, I must request a 'maternity leave' commencing no later than the start of the seventh month of pregnancy which is only 5 weeks away. In addition, I have 27 days sick leave which I will not be paid for under regular sick days or emergency leave policy. *Up to this point, I have had no written correspondence with the district concerning this matter.* Together with my husband, I am frantic over our impending financial crisis which is the result of the discriminatory practices of the school district. (See Title 29, Labor, Chapter XIV, Part 1604, Sec. 1604.10)"

On November 29, 1972, the governing board of the School District discussed its then current maternity leave policy. Superintendent Snodgrass stated that an updated maternity leave was being researched by the County Counsel and was under discussion with the Certificated Counsel (a teachers' bargaining representative, California Education Code §13085), and requested that the board take interim action to consider employee requests to work beyond the start of the seventh month of pregnancy, on an individual basis (A. 17-20). On December 13, 1972, the governing board approved the proposed interim maternity leave policy (A. 21-24).

On December 14, 1972, Mrs. Berg notified the District that she was pregnant, that her child was expected to be born on March 24, 1973, and that she requested a pregnancy leave of absence to begin on February 23, 1973, one month before the expected date of delivery (A. 9, 37). On December 20, 1972, Mrs. Berg submitted a further request, supported by a statement from her physician, that her pregnancy leave begin on March 23, 1973, one day before her expected delivery date (A. 9, 25, 26). Her doctor's letter was dated December 6, 1972, and stated:

"Mrs. Bergs estimated date of confinement is March 24, 1973.

Mrs. Berg may work until the date of her confinement—March 24, 1973, and not stop at the seventh month date which will be January 13, 1973.

If there is any additional information you need, please contact this office."

The School District responded on December 27, 1972, as follows (A. 28):

"Out of concern for District liability and effectiveness of the educational program, we would prefer to involve a District appointed physician in any decision related to extension of your maternity leave to one day prior to date of confinement.

Should a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration.

We shall be pleased to process, on receipt, your request to see a District physician."

By a letter from her attorney, Mrs. Berg refused to be examined by a District physician (A. 29-33), and there was no further communication between the parties prior to filing of the District Court action.

On January 12, 1973, counsel for Mrs. Berg wrote to the EEOC and requested a notice of her right to sue (R. 124).

On February 5, 1973, she filed this suit in the District Court as a class action based on 42 USC §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 USC §§2000e, et seq. Jurisdiction was invoked under 28 USC §§1331 and 1343(3) and under 42 USC §2000e-5(f) (A. 1, 5).

On February 8, 1973, Mrs. Berg filed a motion for preliminary injunction (A. 1, 28).

In opposition to the motion for a preliminary injunction, the School District obtained a medical opinion on the subject of employment of pregnant teachers during the late period of their pregnancy and adopted a revised "interim" maternity leave policy (A. 47-56). The affidavit of Maxwell Thebaut, M.D., a board certified specialist in obstetrics and gynecology, showed inter alia:

a. ". . . a teacher in late pregnancy presents a high degree of risk with respect to the sudden onset of spontaneous medical emergencies." (A. 53)

b. ". . . a teacher in late pregnancy is likely to be temporarily disabled or required to leave her

class suddenly and unexpectedly, on a temporary or indefinite basis as the result of conditions present in normal pregnancies. . . ." (A. 53).

c. ". . . a teacher in late pregnancy presents a high degree of risk with respect to medical emergency and harm to herself and her foetus: a. When she undergoes ordinary jostling and bumping incident to the movement of students on school premises; b. When she is required to supervise student games and sports . . ." (A. 54).

d. ". . . a teacher in late pregnancy can be expected to have unusual difficulty in coping with minor emergency situations such as student fights, accidents, and illnesses." (A. 55).

e. "In my opinion, a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy, and any medical report stating that a pregnant teacher may work until the date of her confinement would be inconsistent with prudent medical practice in the specialty of obstetrics and gynecology." (A. 56).

The affidavit of Sam Teese, Assistant Superintendent of Personnel, showed the School District had adopted a revised interim maternity leave policy, as follows:

"'Maternity leave shall begin at least 30 days before the expected date of delivery unless the Assistant Superintendent of Personnel determines a different beginning date, as follows:

A. The Assistant Superintendent may determine a beginning date for an employee's maternity leave earlier or later than 30 days before the expected date of delivery, taking into account the

available medical information, the employee's job performance, and the interests and requirements of the district, its schools, classes, and pupils.

B. In any case in which he deems it advisable, the Assistant Superintendent may require a pregnant employee to obtain a medical report from a physician selected and paid by the District.

C. A request for continued employment at the convenience of the employee shall be made to the Assistant Superintendent at least one month prior to the date on which maternity leave would ordinarily begin. The request must be followed by a statement from the employee's physician current within two weeks of the ordinary leave date, including the following information.

a) The expected date of delivery, and the date to which the physician recommends continued employment.

b) A statement as to whether the pregnancy is unusual in any respect.

c) A statement as to the current health of the employee and the foetus.

d) A statement as to whether the employee is able to continue her employment to the given date without risk to the employee, the foetus or the District, given that the employment may include the following factors:

Maintaining control and direction of approximately 30 active students.

Staying with a class for periods of not less than one hour without interruption.

Undergoing jostling and bumping incident to the movement of students on school premises.

Supervising games and sports of students.

Coping with student fights, accidents and illnesses.

Driving to and from work.

D. If an employee disagrees with the determination of the Assistant Superintendent she may appeal in writing to the District Superintendent stating her reasons for such disagreement.'" (A. 47-49).

The affidavit of Sam Teese showed that Mrs. Berg's teaching duties, and those of teachers generally, included the factors of employment identified in part C(d) of the School District's revised interim maternity leave policy (A. 49-50). His affidavit also showed that neither Mrs. Berg or any other School District employee was subject to termination of her employment by virtue of maternity leave (A. 50).

In response to the School District's position, Mrs. Berg filed an affidavit by Robert Tomfohrde, M.D., *dated December 21, 1972,* stating (A. 74):

"I am a medical doctor. I am familiar with Sonja Lynn Berg, as she has been under my care during her pregnancy.

As of this date there is no medical contraindication for this patient, Sonja Lynn Berg, to work as a teacher until the date of her confinement, March 24, 1973."

After hearing on February 22, 1973, the District Court issued a preliminary injunction, and Mrs. Berg continued to teach until the day before her child was born. (A. 78, 103).

On April 23, 1973, Mrs. Berg noticed a motion to file a "Supplement to Complaint" to allege the issuance of notice of her right to file a civil action under Title VII, on February 21, 1973 (A. 2, 83). This motion was granted by the District Court on June 6, 1973 (A. 94), and a Supplement To Complaint was filed by Mrs. Berg on June 7, 1973 (A. 3, 95). The Supplement To Complaint alleges that on February 21 ,1973 the plaintiff's right to maintain the action under Title VII was noticed by the Department of Justice and incorporates a letter of that date to Mrs. Berg (A. 95-97).

On July 20, 1973, Mrs. Berg noticed a motion for summary judgment against the School District (A. 3, 99). On August 13, 1973, the School District responded to Mrs. Berg's summary judgment motion and filed its own cross-motion for summary judgment (A. 105). The School District argued, inter alia, that the District Court lacked subject matter jurisdiction of Mrs. Berg's Title VII claim (R. 263), and that the School District's interim maternity leave policy did not violate Title VII (R. 265). Together with its arguments, the School District filed a copy of Mrs. Berg's November 15, 1972, EEOC charge with the District Court (A. 108-113). After hearing on August 20, 1973, the District Court made and on August 31, 1973, filed its order granting Mrs. Berg's motion for summary judgment on her Title VII claims and granting in part her motion to certify a class action (A. 121).

On December 4, 1973, the District Court entered its judgment certifying a class and granting Mrs. Berg

a summary judgment (a) enjoining defendants from denying Mrs. Berg accumulated sick leave compensation for the period during which she was physically incapacitated and medically unable to work because of the effects of her pregnancy and delivery, and (b) enjoining defendants from adopting or enforcing policies on commencement and duration of leave, reinstatement, and payment of sick leave which apply to disability due to pregnancy or childbirth on terms and conditions different from those applied to other temporary disabilities. This judgment also awarded Mrs. Berg $3,675.00 in attorney's fees (A. 121). The judgment of the Trial Court was affirmed by the Ninth Circuit Court of Appeals, and Mrs. Berg was awarded an additional $1,500.00 in attorney fees (528 F.2d 1208).

SUMMARY OF ARGUMENT

I. The District Court lacked subject matter jurisdiction of Mrs. Berg's Title VII claims because she failed to comply with the statutory prerequisites to suit under the statute. The statutory prerequisites which Mrs. Berg did not meet were (i) filing timely and valid EEOC charges of employment discrimination and (ii) receiving a notice of her right to sue.

A. When Mrs. Berg filed her EEOC charge of discrimination respecting the School District's maternity leave policies, those policies had not been applied to her, and her charge was premature. Mrs. Berg's charge as filed was purportedly "under oath", but it failed to show that her oath had been taken by any

person authorized to administer an oath. The charge therefore failed to meet the statutory requirement that be under oath and in the form required by the Commission. There was no showing that this defect had been remedied when her action was filed or when judgment was granted by the District Court.

B. Mrs. Berg did not receive the statutory notice of her right to sue until after this action was filed. The Court of Appeals nevertheless upheld the District Court's Title VII jurisdiction on two grounds: 1) that the District Court could take jurisdiction of a private Title VII action to grant preliminary injunctive relief pending compliance with the statutory prerequisites to suit, and 2) that late receipt of the notice of right to sue cured any jurisdictional defect. The Court of Appeals' decision is based primarily on the *Drew* and *Henderson* cases, which adopted the two theories of jurisdiction it relied upon.

1. *Drew v. Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), is based upon the premise that jurisdiction to grant preliminary injunctive relief exists by implication respecting civil rights act claims which have no express statutory jurisdictional basis. That reasoning is not applicable to claims under Title VII because Congress has made express provision for private actions under that statute. Further, in following *Drew*, the Court of Appeals adopted a theory of presumed irreparable injury resulting from a perceived Title VII violation, contrary to this Court's decision in *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49 (1975).

2. *Henderson v. Eastern Freight Ways, Inc.*, 460 F.2d 258 (4th Cir. 1972), upheld the curative powers of a late notice of right to sue, relying on the general policy of the law to prevent loss of rights by premature action. But that policy was developed and expressed in cases involving matters over which the courts had discretion to forgive premature steps and in which subject matter jurisdiction was not questioned. The policy relied upon in *Henderson* is not applicable with respect to the acquisition of subject matter jurisdiction under controlling statutes.

3. In upholding jurisdiction the courts below contravened established rules of decision. First, they upheld jurisdiction by implication under a statutory scheme which includes express provisions limiting private actions, contrary to this Court's decision in *Nat. R.R. Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), that the remedies expressed in a statute are ordinarily the exclusive means to enforce the duties imposed by the Act. Second, in holding that jurisdiction may be based on facts occurring after suit had been filed, the courts below contravened this Court's decisions in *Mollan v. Torrance*, 9 Wheat. 537 (1824) and *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co.*, 270 U.S. 580 (1926) that Federal Court jurisdiction is determined by the facts which exist at the time suit is filed.

C. In upholding subject matter jurisdiction under Title VII in this case, the lower courts neglected to give effect to the intentions of Congress expressed in the procedural limitations of §2000e-5, as recognized

by this Court (e.g. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Such decisions as *Spirit v. Teachers Ins. & Annuity Assn.*, 416 F.Supp. 1919 (S.D. N.Y. 1976) indicate that Congress' expressed prerequisites have been virtually abandoned as limitations on Title VII litigation. In departing from established rules of decision as expressed in *Rondeau, Nat. R.R. Passenger Corp., Mollan* and *Minneapolis & St. L.R. Co.*, the Court of Appeals decision has improperly extended Federal Court jurisdiction. [See *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951)].

II. Assuming that the lower courts had jurisdiction of Mrs. Berg's Title VII claims, their decisions on the merits were incorrect. *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric Co. v. Gilbert*, 429 U.S. ..... (1976), have established that absent invidious discrimination, employers are free to include or exclude pregnancy or any other physical condition from sickness or disability benefit plans. The rationale underlying the *Geduldig* and *General Electric* decisions is that the exclusion of a physical condition from a disability plan is not unlawful discrimination, per se, notwithstanding that the physical condition is peculiar to one sex; provided that the benefits of the plan as to covered conditions are available to both sexes alike. Under this reasoning, it is immaterial that the benefit at issue is an accrued paid sick leave allowance rather than sickness or disability insurance.

III. The School District's interim maternity leave policy is consistent with this Court's decision in *Cleveland Board of Education v. LaFleur* 414 U.S. 632 (1974). With respect to Mrs. Berg's claim of sex discrimination under Title VII, the interim maternity leave policy is supported by the same considerations that controlled the *Geduldig* and *General Electric* decisions. Pregnancy is a specific and particular condition. It is different from other illnesses or disabilities which might affect a teacher's capacity to teach. So long as the District does not use pregnancy as a pretext for sex discrimination, it may make special provisions responsive to the actual problems presented by pregnant teachers.

ARGUMENT

I

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OF MRS. BERG'S TITLE VII CLAIMS

Mrs. Berg brought this action under 42 USC §§1981 and 1983, the Fourteenth Amendment to the United States Constitution, and 42 USC §2000e-5 (f), to prohibit the School District from applying its maternity leave policy and to compel the District to grant paid sick leave benefits for absences due to pregnancy and maternity. The District Court granted Mrs. Berg summary judgment on her Title VII claims only, over the objection of the School District that she had failed to establish the conditions prerequisite to Federal Court jurisdiction under the statute.

The statutory prerequisites which Mrs. Berg did not meet were (i) filing timely charges of employ-

ment discrimination with the EEOC and (ii) receiving a notice of her right to sue. She failed to meet the first prerequisite because her November 15, 1972, EEOC charge was filed before the School District had taken any action with respect to her and was not filed under oath. She failed to meet the second prerequisite because she filed the instant action before notice of her right to file a civil action was given by the Attorney General.

A.

MRS. BERG DID NOT FILE A TIMELY OR VALID EEOC CHARGE

1. Mrs. Berg was not "aggrieved" when her EEOC charge was filed.

Mrs. Berg's EEOC charge was filed before the School District took any action respecting her maternity leave. The charge was filed on November 15, 1972, and states: "Up to this point, I have had no written correspondence with the district concerning this matter." It was not until December 14, 1972, that she requested maternity leave, and she did not request postponement of her leave to the day before her expected confinement until December 20, 1972. Apart from requesting that its own physician examine her, the School District never had a chance to apply its maternity leave policy in her case.

The statute provides for the filing of an EEOC charge by "a person claiming to be aggrieved" [42 USC §2000e-5(b)], "within one hundred and eighty days after the alleged unlawful employment practice occurred" [42 USC §2000e-5(e)]. This language contemplates some occurrence between the respondent

and the charging party giving rise to a claim upon which a timely EEOC charge must be filed.

In *Hackett v. McGuire Bros.,* 445 F.2d 442 (3rd Cir. 1971), the Court concluded that the use in 42 USC §2000e-5 of the language, "a person claiming to be aggrieved," showed a congressional intention to define standing for charging purposes as requiring the same "injury in fact", required for standing under Article III of the Constitution.

This interpretation has been followed by the EEOC, which ruled that to establish standing as an aggrieved person within the meaning of Title VII, a charging party must allege that he or she has been injured in fact (EEOC Decision No. 75-006, July 30, 1974; 11 FEP Cases 1498).

To establish injury in fact, a plaintiff or claimant must allege more than speculative or hypothetical harm, and under Title VII a respondent ought not to be subjected to an EEOC charge without having taken some action referable to the charging party. This Court has recently held that conjectural and abstract claims of injury are not sufficient to establish the "injury in fact" giving rise to a justiciable claim. *Warth v. Seldin,* 442 U.S. 490 (1975); *Schlesinger v. Reservists To Stop The War,* 418 U.S. 208 (1974).

In Title VII cases, the Congressional mandate that an EEOC charge be filed within one hundred and eighty days after occurrence of an unlawful employment practice gives rise to the need for a rule of decision that will enable lower courts and parties to

ascertain when the mandated period of limitations will begin. Petitioners believe that such a rule should at least require tangible injury of the kind required for Article III jurisdiction. In this case, Mrs. Berg filed an EEOC charge while the School District's maternity leave policy was in a state of flux. Between the time she filed her charge in November and requested leave in December, the policy had been materially changed and was in an "interim" status. Before December, the School District had no opportunity to determine its course of action respecting Mrs. Berg, and petitioners do not believe that she was "aggrieved" when she filed her November 15, 1972, EEOC charge.

2. Mrs. Berg's EEOC charge was not under oath and was therefore not a valid charge.

The statute requires that EEOC charges be "under oath or affirmation" and "in such form as the Commission requires" [42 USC §2000e-5(b)]. The regulations of the Commission require that a charge be sworn to before a notary public, Commission representative, or other person empowered to administer oaths. (29 C.F.R. §1601.8.) Mrs. Berg's charge purported to be signed under oath or affirmation, but it was not under oath in the form required by the Commission in that it failed to show her oath was taken by any person authorized to administer an oath.

Several courts have held that this deficiency might be remedied after the fact, but the oath to the charge had not been perfected at the time Mrs. Berg brought her District Court action on February 5, 1973. When

judgment was granted by the District Court there was no showing that this defect had been remedied.

In *Russell v. American Tobacco Co.,* 528 F.2d 357 (4th Cir. 1975), cert. den., the court held that the requirement of the 1964 Act that a Title VII complaint be sworn to was not a jurisdictional prerequisite to suit. But the oath provision was modified by the 1972 amendments to Title VII, and the provision applicable to this action is that "Charges shall be in writing under oath or affirmation". Use in legislation of the word "shall" imports a mandatory direction *(Escoe v. Zerbst,* 295 U.S. 490, 493 [1935]. In *EEOC v. Appalachian Power Co.,* ....., F.Supp. ....., 13 FEP Cases 1294 (W.D. Vir. 1976), the District Court held that the requirement that an EEOC charge be under oath was mandatory under the modified language of the statute. Given the absence of an oath, the Court found that the EEOC charge was not valid and that the Court was without jurisdiction.

Petitioners believe that Congress' intent in introducing the word "shall" into the statute is clear and that under Title VII as amended in 1972, an EEOC charge is not valid unless it is under oath and in the form required by the Commission.

B.

MRS. BERG'S SUIT WAS NOT AUTHORIZED BY A TIMELY NOTICE OF HER RIGHT TO SUE

This action was filed before Mrs. Berg received the Attorney General's statutory notification of her right to bring a private civil action [42 USC §2000e-5(f)

(1)]. The Court has clearly and repeatedly expressed its view that the notice required by the statute is a prerequisite to Federal Court jurisdiction of a Title VII suit:

> "Title VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§2000e-5(b), (e), and (f)." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 at 47 (1974).

See also: *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 at 798 (1973).

Nevertheless, in its decision below, the Ninth Circuit held that Title VII implicitly vests the Federal Courts with jurisdiction of private suits prior to compliance with the statutory prerequisites to a private civil action. The Circuit Court further held that jurisdictional defects in Title VII actions can be cured by subsequent fulfillment of the statutory prerequisites. Petitioners contend that those rulings were erroneous.

1. The Court of Appeals' Decision that Federal Courts may take preliminary jurisdiction of a Title VII Action to maintain the status quo is not substantiated by the authorities relied upon.

The 9th Circuit Court said:

> ". . . , it appears to us that the district court had subject matter jurisdiction under Title VII

> itself to reach the merits of the preliminary injunction issue. In a limited class of cases such as this one, in which there exist both a high probability in the claimants ultimate success on the merits and the threat of irreparable injury of the sort which the Act seeks to avoid, a Title VII claimant may personally bring suit to maintain the status quo pending disposition by the EEOC of the underlying charge of discrimination. See *Drew v. Liberty Mutual Insurance Co.,* 480 F.2d 69, 72-76 (5th Cir. 1973); *Culpepper v. Reynolds Metals Company,* 421 F.2d 888, 893-895 (5th Cir. 1970); Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1256-1259 (1971)." (Opinion below, 528 F.2d 1208 at 1211-1212).

That opinion relies primarily on the authorities cited.

a. Drew v. Liberty Mutual Insurance Co., 480 F.2d 69 (5th Cir. 1973) supports the court's decision but is based on an erroneous premise.

The *Drew* opinion is on point. It holds that a private individual may sue in Federal Court to maintain the status quo pending action by the EEOC on a charge of discrimination under Title VII, before a "Notice of Right to Sue Within 90 days" has been issued. The Court in *Drew* stated that Title VII expressly declares certain discriminatory practices to be unlawful [42 USC §2000e-2(a)]. It further stated that general Federal Court jurisdiction to enforce Title VII was to be implied from the Fifth Circuit decision in *Sanders v. Dobbs Houses, Inc.,* 431 F.2d 1097 (5th Cir. 1970) and the Supreme Court decision in *Jones v. Alfred Mayer Co.,* 392 U.S. 409 (1968).

In *Jones* the Supreme Court upheld Federal Court jurisdiction under 28 USC §1343(4) of a civil action to enforce rights based on 42 USC §1982. But in that case the Civil Rights Act provision lacked any explicit method of enforcement (See 392 U.S. 409 at 412, footnote 1, and at 414, footnote 13). The *Sanders* decision followed the rationale of *Jones* and permitted a Federal Court action to enforce 42 USC §1981.

But the rationale for jurisdiction under 28 USC §1343(4) expressed in the *Jones* decision is not applicable to Title VII actions. Title VII is not silent respecting the rights of individuals to bring private civil actions. 42 USC §2000e-5(f) specifically provides for private civil actions by persons alleging employment practices unlawful under the Act. Where jurisdiction exists under Title VII independent of 28 USC §1343, the rationale expressed in *Jones* and *Sanders* is inappropriate.

In any event, jurisdiction under §1343 exists only as to civil actions "authorized by law." The civil actions "authorized by law" under Title VII are subject to the prerequisites expressed in §2000e-5.

In *Troy v. Shell Oil Company,* 378 F.Supp. 1042 at 1046-1048 (E.D. Mich. 1974), (appeal dismissed as moot, 519 F.2d 403, 6 Cir. 1975), the District Court recognized that the Fifth Circuit's reasoning in *Drew* did not substantiate the decision it reached.

> ". . . when discrimination of the type covered by both statutes is involved, relief may be available under §1981 et seq. which is not available under Title VII because of a failure to exhaust administrative remedies. See, e.g., *Sanders v. Dobbs Houses, Inc., supra; Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011 (5th Cir. 1971). But where, as here, the plaintiff can assert no claim under a procedurally unencumbered statute, the readier availability of preliminary relief thereunder is obviously irrelevant." (*Troy v. Shell Oil Company, supra,* 378 F.Supp. 1042 at 1047.)

See also: *Jerome v. Viviano Food Company, Inc.,* 489 F.2d 965 (6th Cir. 1974).

The theory of jurisdiction to grant preliminary relief followed below and in *Drew* leads to a logical conundrum. If Federal Courts have jurisdiction under 28 USC §1343 of Title VII claims free of the statute's jurisdictional prerequisites, that jurisdiction is not partial, but encompasses full authority to adjudicate the claims at issue. On the other hand, if Federal Courts do not have subject matter jurisdiction, they may not assume jurisdiction to grant preliminary injunctive relief. *Arrow Transp. Co. v. Southern R. Co.,* 372 U.S. 658 (1963); *Sires v. State of Washington,* 314 F.2d 883 at 884 (9th Cir. 1963); *Fort Worth Nat'l Corp. v. Federal Savings & Loan Ins. Corp.,* 469 F.2d 47 at 54 (5th Cir. 1972).

Petitioners believe that *Drew* was not correctly decided. The *Drew* case appears to hold that Federal Courts may grant temporary injunctive relief and award attorney fees in a Title VII action without any express jurisdictional basis.

b. Culpepper v. Reynolds Metals Company, 421 F.2d 888, 893-895 (5th Cir. 1970), does not pass upon acquisition of subject matter jurisdiction.

The *Culpepper* opinion holds that Federal Courts may, as an exercise of their inherent powers, grant temporary injunctive relief in Title VII actions. But in that case the EEOC charge had been timely filed, the "suit letter" had been issued, and the Federal Court action was timely filed thereafter (421 F.2d 888 at 890). The *Culpepper* decision does not purport to pass on the power of a Federal Court to act when Title VII's statutory prerequisites to a private civil action have not been met.

c. The Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1256-1259 (1971), does not accord fair value to Congress' prescribed method for resolving Title VII charges.

The third authority cited in the *Berg* opinion, one also relied upon in *Drew,* is a Harvard Law Review note. In petitioners' opinion, the views expressed in the note cannot be reconciled with the Title VII mandate of "informal methods of conference, conciliation, and persuasion." [42 USC §2000e-5(b)]. In *Alexander v. Gardner-Denver Co., supra,* 415 U.S. 36, this court recognized a principle of Title VII that has been frequently emphasized by court decisions: Congress' objective under the Act is, where possible, to resolve employment discrimination charges by State and Federal administrative action without subjecting employers to suit in the Federal Courts. Congress' intention in this regard is clearly expressed in the language of 42 USC §2000e-5:

> "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall* endeavor to eliminate any such alleged unlawful practice by informal methods of conference, conciliation, and persuasion." (42 USC §2000e-5(b), emphasis added.)

The law review article advances the theory that courts can assume jurisdiction of a cause of action, without express statutory authority, to preserve the status quo pending administrative proceedings. With respect to Title VII matters, the law review adopts a position which may be said to suggest court actions as a "touch of the whip" to reluctant employers:

> ". . . the granting of such relief would not do violence to the expressed statutory preference for voluntary conciliation over court action. . . . Ultimately, the granting of preliminary relief might enhance, rather than destroy, the effectiveness of conciliation by increasing the pressure on the respondent to agree to settlement. . . .
>
> The relief available through preliminary injunctions in similar situations is generally characterized as the preservation of the status quo. Yet ascertaining the status quo is often difficult and relief pendente lite can be more accurately characterized as *'a temporary settlement based on a free evaluation of all the equities.'"* (84 Harv.L.Rev. 1109 at 1258, emphasis original.)

Petitioners do not agree that such a "temporary settlement" by preliminary injunction would "not do violence" to the Congress' expressed preference for voluntary conciliation. The Court can take judicial

notice that in many cases the granting of a preliminary injunction involves an effective adjudication of litigated disputes:

> "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." (Rule 65(a)(2), in part, Federal Rules of Civil Procedure.)

In petitioners' opinion, the entrance of a Federal Court into any dispute under Title VII will involve the judge in all decision-making thereafter. If this Court is concerned to reduce the workload of District Courts, this approach should be rejected. A responding party would be ill-advised to attempt resolution of an EEOC conciliation proceeding without also settling any pending litigation on the subject. Also, it is difficult to believe Congress contemplated that an employer could be subjected to a Title VII attorney fee award, as in *Drew,* when that employer had not been given the benefit of the opportunity for conciliation mandated by the statute.

d. The Court of Appeals improperly relied upon a presumption of irreparable injury.

Petitioners do not believe that Mrs. Berg made a showing of irreparable injury when she requested and obtained preliminary injunctive relief. Her motion was brought to obtain a preliminary injunction prohibiting the School District from forcing her to take a leave of absence before the time she and her

physician determined that was necessary. (Order Granting Motion For Preliminary Injunction, R. 71-72). The School District's interim policy permitted her to work to within thirty days of her delivery date, and the only injury threatened by application of that policy was the loss of three or four weeks of employment with pay. If Mrs. Berg had suffered harm resulting from application of the policy, such loss was easily compensable by money damages.

The District Court and the Court of Appeals did not purport to find that Mrs. Berg was threatened with actual irreparable injury. Rather, they adopted the position that irreparable injury would be presumed upon a finding that the School District's interim maternity leave policy violated Title VII.

> "As noted in *Culpepper, supra,* 421 F.2d at 894-895, the existence of irreparable injury may in appropriate circumstances be presumed, for purposes of preliminary injunctive relief, from the district court's preliminary determination that Title VII has been violated." (Opinion below, 528 F.2d 1208 at 1212, n.6, emphasis original).

Petitioners believe the holding of the Court of Appeals that irreparable injury may be presumed from a perceived violation of law, is contrary to this Court's decision in *Rondeau v. Mosinee Paper Corporation,* 422 U.S. 49, (1975). In *Rondeau,* a private litigant had obtained injunctive relief in a suit under §13(d) of the Williams Act [15 USC §78m(d)]. This Court granted certiorari to determine whether

a showing of irreparable harm is necessary for a private litigant to obtain an injunction under the Act. The Court pointed out that the basis for injunctive relief in the Federal Courts:

> "'. . . has always been irreparable harm and inadequacy of legal remedies.' *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500, 506-507 (1959)" (*Rondeau v. Mosinee Paper Corporation, supra,* 422 U.S. 49 at 57).

The *Rondeau* opinion rejected the proposition that the bare fact of a Williams Act violation could justify injunctive relief without regard to traditional equitable principles:

> "Thus, the fact that respondent is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief." (*Rondeau v. Mosinee Paper Corporation, supra,* 422 U.S. 49 at 64-65.)

When Congress amended Title VII in 1972 to authorize Commission action to obtain preliminary injunctive relief, it demonstrated its commitment to the application of traditional judicial standards by requiring that such relief be obtained only "in accordance with Rule 65 of the Federal Rules of Civil Procedure" (42 USC §2000e-5(f)(2), in part).

The holding of this Court in *Rondeau* and the intentions of Congress, demonstrated by specific statutory reference to Rule 65, were violated when the lower courts in this case permitted preliminary

injunctive relief to be based upon presumed irreparable injury arising from a perceived Title VII violation.

2. The Court of Appeals' decision that jurisdictional defects in Title VII actions can be cured by subsequent fulfillment of the statutory prerequisites is not substantiated by the authorities relied upon.

The 9th Circuit Court opinion says:

> ". . . the later issuance of the 'right to sue' letter coupled with the filing of the supplemental complaint operated to cure any initial jurisdictional defect. *Henderson v. Eastern Freight Ways, Inc.,* 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied,* 410 U.S. 912 (1973); *Jones v. United Gas Improvement Corporation,* 383 F.Supp. 420, 424 (E.D. Pa. 1974); *Dodge v. Giant Food, Inc.,* 3 EPD ¶8184 (D.D.C. 1971), affd., 488 F.2d 1333 (D.C. Cir. 1973)." (Opinion below, 528 F.2d 1208 at 1212.)

a. Henderson v. Eastern Freightways, Inc., 460 F.2d 258 (4th Cir. 1972) supports the court's decision but is based on an erroneous premise.

The *Henderson* decision is the leading authority for the proposition that a notice of right to sue issued after a Federal Court action has been filed under Title VII has the effect of curing the jurisdictional defect and validating the pending action. Apart from a generalized statement that Title VII should be generously construed, the rationale advanced by the *Henderson* opinion is:

> ". . . a general policy of law to find a way in which to prevent loss of valuable rights, not because something was done too late but rather

because it was done too soon. *Avery v. Fischer,* 360 F.2d 719, 723 (C.A. 5, 1966)." (460 F.2d 258 at 260.)

For an explanation of the rule applied in *Henderson* one must look to *Avery v. Fischer,* 360 F.2d 719 (5th Cir. 1966). The *Avery* opinion concerns a prematurely filed claim asserted in a proceeding under Chapter X of the Bankruptcy Act. The opinion describes several cases in which premature bankruptcy claims were allowed and in which premature filing of notices of appeal were permitted, although *Avery* held the claim in question was not timely filed. The autorities cited in *Avery* and underpinning the *Henderson* decision do not involve the basic, subject matter jurisdiction of Federal Courts. In such matters as the filing of bankruptcy claims and exercising appellate jurisdiction under their own rules, courts have considerable freedom to exercise their own judgment and discretion. This is not true when subject matter jurisdiction is at issue. The jurisdiction of the Federal Courts is controlled by Congress under Article III of the Constitution, and the courts are strictly constrained to ascertain and follow the congressional mandate.

> "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court . . . would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." *American Fire & Cas. Co. v. Finn,* 341 U.S. 6 at 17-18 (1951).

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg v. Ambrecht,* 327 U.S. 392 at 395 (1946).

b. The decision in Jones v. United Gas Improvement Corporation, 383 F.Supp. 420, 424 (E.D. Pa. 1974) is not applicable to the facts of this case.

In *Jones* the plaintiff had been discharged on July 6, 1971, and filed a charge of discrimination with the EEOC the next day. More than two *years* later Jones and his attorney requested a "right to sue letter", which took three months to obtain, during which time suit had been filed. The Court pointed out that under 42 USC §2000e-5(f)(1) the EEOC is required to give the notice permitting a civil action after one hundred and eighty days from the time a charge is filed, and stated:

> ". . . courts have almost invariably held that action or inaction by the EEOC should not prejudice the right of an individual to a judicial determination of the merits of his claim of discrimination." (383 F.Supp. 420 at 424.)

In this case, Mrs. Berg filed an EEOC charge on November 15, 1972, prior to any action by the School District. She requested an EEOC notice on January 12, 1973, 58 days after the charge and 16 days after the School District's December 27, 1972, letter requesting that she agree to be examined by a Dis-

trict physician. The Attorney General's notice of her right to file a civil action is dated February 21, 1973, 98 days after her November charge. This notice was premature. Title VII requires either that a charge be dismissed or that one hundred eighty days be allowed for Commission action before a notice of right to sue is authorized [42 USC §2000e-5(f)(1)]. Furthermore, the EEOC regulations authorize demand of such a notice only after expiration of one hundred and eighty days, [29 C.F.R. §1601.25b(e)]. Mrs. Berg was not prejudiced by EEOC inaction beyond the one hundred and eighty day waiting period. Rather, the opposite is the case. She filed a premature charge, filed a premature Federal Court action, and received a premature notice from the Attorney General upon her demand. All of these actions were contrary to the language and intentions of Title VII.

c. Dodge v. Giant Food, Inc., 3 EPD ¶8184 (D.D.C. 1971), [3 F.E.P. Cases 374], affd., 488 F.2d 1333 (D.C. Cir. 1973) does not provide any rationale for its conclusion.

The *Dodge* case includes a holding by the District Court consistent with the decisions in *Henderson* and the opinion below. But the District Court opinion in *Dodge* does not advance a rationale for its conclusion except to state that the notices of right to sue issued after the action was filed "cured the jurisdictional defect in plaintiffs' original complaint." The Court of Appeals affirmed the District Court without commenting on the receipt of the notices after filing of the action.

3. The Court of Appeals' decision contravenes established rules respecting statutory construction and the vesting of Federal Court jurisdiction.

a. The decision is contrary to the rule that express statutory provision for one form of proceeding implies that no other means of enforcement is intended.

Title VII has always contained express provisions indicating the circumstances under which Federal Court actions might be maintained under the statutes, and designating the persons empowered to bring such actions. The 1972 amendments to Title VII gave the EEOC and the Attorney General power to bring a Federal Court action for preliminary relief pending final disposition of a charge [42 USC §2000e-5(f)(2)]. The *Drew* decision held that Congress did not intend to restrict this right exclusively to the agencies named in the amendments. But it is a rule of statutory construction that when legislation expressly provides a particular remedy, courts should not expand the coverage of the statute.

In *Nat. R.R. Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), the Association as a private party brought an action under §307 of the Amtrak Act (45 USC §547) to enjoin the discontinuance of certain passenger trains. The statute authorized suit by the Attorney General and by employees in the case of labor agreements. As to other private actions, the Court held:

> "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States*, 278 U.S. 282, 289, 73 L.Ed. 379, 49 S.Ct. 129 (1929). This principle of statutory construction

reflects an ancient maxim—expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in §307(a) are the exclusive means to enforce the duties and obligations imposed by the Act." (414 U.S. 453 at 458.)

Petitioners believe that the limited authorizations given for suit by the Amtrak Act and the limited authorizations expressed in Title VII are similar in kind and subject to the rule of construction expressed above. See also: *SEC. Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975), and *Goldman v. First Federal Sav. & L. Assn. of Wilmette,* 518 F.2d 1247 (7th Cir. 1975).

This rule of construction will yield in the face of clear contrary evidence of legislative intent (*Nat. R.R. Passenger Corp. v. Passengers Assn., supra*). Petitioners do not believe the legislative history shows a contrary intention. The joint explanatory statement to the conference report on HR 1746 specifically discussed the provision in question, and there is no evidence that a private right to obtain preliminary injunctive relief was contemplated:

> "The Senate amendment authorized the Commission or the Attorney General to seek preliminary injunctive relief. The House bill authorized the Commission to seek preliminary relief and required a showing that substantial and irreparable injury to the aggrieved party would be unavoidable. The Senate receded with

> an amendment that authorizes the Commission or the Attorney General to seek preliminary injunctive relief and a provision that Rule 65 of the Federal Rules of Civil Procedure should govern all actions brought under this subsection." (Joint Explanatory Statement of Managers At The Conference On HR 1746 To Further Promote Equal Employment Opportunities For American Workers, in part, *U. S. Code Congressional and Administrative News,* 92nd Congress, Second Section (1972) Vol. 2, p. 2182.)

b. The decision is contrary to the rule that Federal Court jurisdiction is determined by the facts which exist at the time suit is filed.

In *Mollan v. Torrance,* 9 Wheat. 537 (1824) the diversity jurisdiction of the District Court was placed in issue by a plea that plaintiff's endorser and the defendants were both citizens of the State of Mississippi. The plea was claimed to be defective because it alleged lack of diversity at the time of the plea and not at the time the action was brought. The opinion by Chief Justice Marshall states:

> "It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." (9 Wheat. 537 at 539.)

The Supreme Court applied this rule in *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co.,* 270 U.S. 580 (1926) on a motion to remand. The motion was based upon the occurrence of new factual developments allegedly perfecting the jurisdiction of the District Court. Justice Brandeis wrote:

> "The later facts alleged could not conceivably affect the result of the case before us. The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought." (270 U.S. 580 at 586.)

See also: *National Labor Rel. Bd. v. Atlanta Metallic Casket Co.*, 205 F.2d 931 (5th Cir. 1953); *Royalty Service Corporation v. City of Los Angeles*, 98 F.2d 551 (9th Cir. 1938).

Petitioners believe that this rule is correct in principle and that great mischief and uncertainty will result if it is not followed. If Federal Court jurisdiction can be acquired as a result of facts occurring after an action is filed, speculative litigation will be encouraged and the effect of all statutes governing jurisdiction will be left in doubt. This is contrary to the principle expressed in *American Fire & Ca. Co. v. Finn, supra:*

> ". . . prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation. . . ." (341 U.S. 6 at 8.)

C.

MRS. BERG'S TITLE VII CLAIMS SHOULD BE DISMISSED

Petitioners believe the decision of the Court of Appeals can not be substantiated upon a careful examination of its rationale. But petitioners recognize that courts are loath to turn away those who seek their aid, and believe this concern motivated

the Court of Appeals to adopt a rule "that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits" (528 F.2d 1208 at 1212). Nevertheless, the decision of the Court of Appeals has improperly extended Federal Court jurisdiction in Title VII cases.

1. The Court of Appeals' decision contravenes the procedural limitations imposed by Congress on private Title VII actions.

The enforcement provisions of Title VII are specific and elaborate. A charge must meet specific requirements as to writing, oath, and form. The charge must be filed by or on behalf of a person claiming to be aggrieved. The charge must be filed within 180 days after occurrence of the alleged unlawful employment practice. There must be deferral in favor of State unlawful employment practice proceedings. Many specific functions are required of the EEOC and the Attorney General. The statute provides for notice of right to sue only after the EEOC has dismissed a charge or after one hundred and eighty days have passed without conciliation or other action by the EEOC or the Attorney General. It cannot reasonably be said that Congress did not intend these procedures to be followed. The enactment of Title VII and its 1972 amendments involved great legislative contests and intensely opposing forces. The complexities of the Act reflect compromises that all interested sides made. These compromises were required to obtain enactment of the law, and it was enacted with the intent that its provisions

be observed. The Courts must observe the intentions of Congress notwithstanding that adherence to the letter of the statute will require the rejection of claims which may deserve their sympathies.

> "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of the words employed." *Flora v. United States,* 357 U.S. 63 at 65 (1958).

In *Love v. Pullman Co.,* 404 U.S. 522 (1972); *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792; and *Alexander v. Gardner-Denver Co., supra,* 415 U.S. 36, this Court has recognized the limitations imposed by Congress upon the rights of private persons to institute Federal Court actions under Title VII. These jurisdictional prerequisites include i) the filing of timely EEOC charges and ii) receipt of the statutory notice of right to sue.

But the decision of the Court below permits a Title VII action to be maintained practically in disregard of the policies expressed by Congress. Permitting premature court proceedings can only derogate from Congress' concern that informal methods of conciliation and persuasion be utilized before private litigation is allowed.

The holding that Title VII jurisdiction can be validated after a Federal Court action has been filed, has led to results that cannot have been approved by the Congress that enacted Title VII. In *Spirt v. Teachers Ins. & Annuity Assn.,* 416 F.Supp. 1019

(S.D.N.Y. 1976) the plaintiff filed suit before filing a charge with the EEOC. A notice of right to sue was eventually issued more than a year after the action had been filed. The Court upheld its jurisdiction under Title VII on the validation theory expressed in *Henderson v. Eastern Freight Ways, supra,* 460 F.2d 258. Similarly, in *Black Musicians of Pittsburgh v. Local 60-471, Am.Fed.M.,* 375 F. Supp. 902 (W.D. Pa. 1974), relying on *Henderson,* the District Court upheld its jurisdiction under Title VII of a suit brought before the filing of an EEOC charge or the issuance of a notice of right to sue. The results in these cases indicate negation by the Federal Courts of those provisions in Title VII which call for negotiation and impose a one hundred and eighty day waiting period before a private suit may be filed absent earlier dismissal of charges by the EEOC.

2. The Court of Appeals' decision improperly extends Federal Court jurisdiction.

In *American Fire & Cas. Co. v. Finn, supra,* 341 U.S. 6, this Court held that Federal Courts must strictly adhere to limitations on their subject matter jurisdiction. In *Minneapolis & St. L.R. Co. v. Peoria & P.U.R. Co., supra,* 270 U.S. 580, this Court held that jurisdiction can not be obtained by virtue of events occurring after an action has been filed. The decision of the Court of Appeals, and the decisions in *Drew* and *Henderson* do not adhere to these rules. Those decisions require the District Courts to adjudicate private Title VII claims at the outset of a

dispute. But Congress did not intend to allow private preliminary adjudication in Title VII cases. In the view of petitioners, such preliminary adjudication can only result in ousting Title VII claims from the administrative forum. Apart from violating the principles of decision expressed in *American Fire* and *Minneapolis*, this extension of jurisdiction serves to further load a court system that is overextended with respect to its responsibilities. Courts cannot complain of burdens imposed on them by Congress when by lack of self restraint and failure to adhere to rules, they undertake to entertain claims and actions not authorized by statute.

An equally serious problem presented by the decision below is its tendency to encourage operation of our legal system by exceptions rather than by rules. There is great public concern, most apparent respecting criminal law, that the system of justice in the United States is not even-handed. When Courts adopt rules of decision that abandon long established principles such as that expressed by Justice Brandeis in *Minneapolis*, in favor of special cases such as that of Mrs. Berg, they favor special pleading and introduce uncertainty into the law.

If the rule that Federal Court jurisdiction must be determined at the time an action is filed does not apply in Title VII actions, when does it apply? Has the rule been overthrown? If it has, what is the general rule of decision as to when jurisdiction vests? These are very serious questions that will be raised by lawyers and lower courts looking for guidance in

their conduct of future litigation, if this Court affirms the decision of the Court of Appeals.

II

THE SCHOOL DISTRICT'S FAILURE TO ALLOW SICK LEAVE PAY FOR ABSENCES DUE TO NORMAL PREGNANCY AND DELIVERY DID NOT VIOLATE TITLE VII.

In California, school districts are agencies of the state; their regulation and operation are controlled by the State Constitution, and the State Legislature is given comprehensive powers in relation to them. [*Hall v. City of Taft*, 47 C.2d 177 at 179-181, 302 P.2d 574 (1956).] The Legislature enacted Education Code §13456, which governs California school districts respecting maternity leave for teachers. When this action arose, §13456 included the following provisions:

> "The (school district) governing board . . . shall provide for such leave of absence from duty as it deems appropriate for . . . pregnancy or convalescence following childbirth . . . .
>
> ". . . the board may also provide . . . whether leave granted under this section shall be with or without pay . . . .
>
> "This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay." (Cal. Education Code, §13456, in part.)

In accordance with this statutory authorization, the School District maintained a maternity leave policy

that did not allow the use of accumulated sick leave credits to permit pay during normal maternity leave. Relying on its decision in *Hutchison v. Lake Oswego School District No. 7,* 515 F.2d 961 (9th Cir. 1975), the Court of Appeals held that the policy of the School District violated Title VII. The judgment in *Hutchison* has been vacated by this Court and the case remanded to the Ninth Circuit for further consideration in light of *General Electric Co. v. Gilbert,* 429 U.S. ..... (1976) [*Lake Oswego School District No. 7 v. Hutchison,* No. 75-568, ... U.S. .....].

Petitioners contend that the decisions of this Court in *Geduldig v. Aiello,* 417 U.S. 484 (1974) and *General Electric Co. v. Gilbert,* 429 U.S. ..... (1976) are controlling with respect to legality of the School District's failure to allow sick leave usage for absences due to normal pregnancy. In *Geduldig,* this Court held that absent invidious discrimination, lawmakers are constitutionally free to include or exclude pregnancy or any other physical condition from legislation establishing a disability insurance program, on any reasonable basis. (417 U.S. at 496-497, n. 20). In *General Electric* the Court extended the reasoning of *Geduldig* to claims under Title VII. The basic rationale underlying the *Geduldig* and *General Electric* decisions is that exclusion of a physical condition from a disability insurance plan is not unlawful discrimination per se, notwithstanding that the physical condition is peculiar to one sex. In such cases, the benefits of the plan in terms of those conditions that are covered, are available to both sexes alike.

> "Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under §703(a)(1), 42 USC §2000e-2(a)(1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." *General Electric Co. v. Gilbert,* 429 U.S. ..... at .....

The principle of the decisions in *Geduldig* and *General Electric* is applicable to sick leave plans as well as insurance plans. By law in California, full-time teachers accrue entitlements to ten days leave of absence for illness or injury with full pay, for each school year of full-time service. This sick leave entitlement accumulates from year to year (Cal. Education Code §13468). Arguably, the entitlement to paid leave for illness or injury provided at the time of this action did not include pregnancy insofar as pregnancy is a natural condition and not an illness or injury (Thebaut affidavit, A. 56). In any event, the School District excluded sick leave usage for pregnancy leave under §13456. This exclusion of pregnancy from the sick leave plan did not constitute a violation of Title VII unless (a) it was in fact a pretext for gender-based discrimination or (b) it resulted in gender-based effects in terms of disproportionate benefits provided. (*General Electric Co. v. Gilbert, supra,* 429 U.S. ..... at ..... This case was decided on Mrs. Berg's motion for summary judgment upon the theory that the School District's policy was prima facie unlawful under Title VII as

interpreted by the applicable EEOC guideline [29 C.F.R. §1604.10(b)], without regard to the School District's actual intent or to any showing of a gender-based effect. Accordingly, the District Court erred in granting summary judgment to Mrs. Berg on the issue of her right to sick leave pay.

III

THE SCHOOL DISTRICT'S INTERIM MATERNITY LEAVE POLICY DID NOT VIOLATE TITLE VII

The School District has never agreed that insistence upon an examination by its own physician was a procedure limited to pregnant women. Every employer must be able to act when an employee's work is affected by medical conditions or injuries. When children are the subject of that work, an employer's duties in this regard are even greater. But the specifics of the policy at issue in this litigation are peculiar to pregnancy. This particularity was found by the Courts below to give rise to a Title VII violation.

California Education Code §13456, in addition to requiring maternity leave, authorized school district governing boards to adopt reasonable rules and regulations.

> "'. . . prescribing the manner of proof of pregnancy; and 'the point during the course of the pregnancy at which leave of absence shall be taken' . . . ." (Cal. Education Code, §13456, in part.)

The record shows that the School District was working to reformulate its maternity leave policy at the

time this action was filed. On December 13, 1972, the governing board approved an interim policy authorizing consideration of employee requests to work beyond the seventh month of pregnancy, on an individual basis. When this suit was filed on February 5, 1973, the School District found itself with a modified policy which did not provide standards for decision, a demand supported by Mrs. Berg's personal doctor that she be permitted to work until the day of her confinement, and a legal situation dominated by the conflicting Court of Appeals decisions in *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972) and *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973). To attempt a resolution of its problems, the School District obtained an authoritative medical opinion and formulated an interim maternity policy providing for individual consideration of the starting dates for maternity leave and a means of evaluating requests to work beyond thirty days before the expected date of delivery.

The School District's interim maternity leave policy provisions are valid under this Court's decision in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). The interim policy provides for individual consideration of a teacher's request to continue work, based on medically verified standards which take the teacher's working conditions into account, and provide a right of appeal in the case of disagreement. In the *Cleveland Board* opinion this Court stated:

> "The school boards have available to them reasonable alternative methods of keeping physically

unfit teachers out of the classroom. For example, they could require the pregnant teacher to submit to medical examination by a school board physician . . . ." (414 U.S. 632 at 647, n. 14.)

The decision of the Court of Appeals held the very alternative suggested by this Court in the *Cleveland Board* opinion, to be in violation of Title VII as interpreted by the EEOC.

Petitioners believe that the decisions of this Court in *Geduldig v. Aiello, supra,* 417 U.S. 484; and *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., are applicable with respect to the maternity leave policy provisions as well as to the pay provisions. The *Geduldig* rationale is not limited to pay benefits.

> "Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts . . . lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." (*Geduldig v. Aiello, supra,* 417 U.S. 484 at 496 n. 20.)

In its *General Electric* decision, this Court recognized that pregnancy is significantly different from other diseases or disabilities:

> ". . . we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is

> in other ways significantly different from the typical covered disease or disability." (*General Electric Co. v. Gilbert, supra,* 429 U.S. ..... at .....)

Pregnancy is unique and different from other diseases or disabilities. Absent a scheme of invidious discrimination, Title VII is not violated by a procedure designed to obtain an informed opinion when there is disagreement as to the proper time for a maternity leave to begin. Mrs. Berg did not contest the opinions of Dr. Thebaut that a medical report clearing a teacher to work until the date of her confinement would be inconsistent with prudent medical practice; and that a medical report more than two weeks old would not be a reliable statement of the condition of a woman in late pregnancy. (A. 56) But her private physician had concluded as early as December 6, 1972 that Mrs. Berg could work until the date of her confinement on March 24, 1973. His affidavit to that effect dated December 21, 1972, filed in support of her motion for preliminary injunction. (A. 74) On these facts, the School District had good reason to insist upon expert medical information from its own physician.

Given its duties to the children in her classroom, and its knowledge of hazards described in Dr. Thebaut's affidavit, the District was justified in promulgating a procedure to cope with this problem within the law afterwards expressed in the *Cleveland Board* decision. The policy is particularized because pregnancy is a unique condition, presenting

important factors and considerations not present or relevant with respect to other medical conditions.

If the School District had treated its male and female employees differently with respect to medical conditions common to both, the reasoning of the Courts below might have been well taken. But under the *Geduldig* and *General Electric* decisions, the School District could lawfully take measures appropriate to the particular problems presented by pregnancy as distinguished from other medical conditions.

CONCLUSION

For the reasons expressed above, petitioners believe the District Court erred in granting summary judgment for Mrs. Berg and the Court of Appeals erred in affirming that judgment.

If this Court finds the District Court lacked jurisdiction of Mrs. Berg's Title VII claims, petitioners believe the decisions of the Courts below should be reversed with a direction that the case be dismissed. The Trial Court did not pass on Mrs. Berg's claim under 42 USC §1983 against petitioner Snodgrass. But the action against Mr. Snodgrass was in his official capacity (A. 7 ¶V); and the Complaint does not purport to allege personal conduct on his part violative of Mrs. Berg's civil rights. Subsequent to the Trial Court's judgment, this Court decided the legal issues controlling Mrs. Berg's §1983 claim. Under the *Cleveland Board* and *Geduldig* decisions, her §1983 claim against Mr. Snodgrass lacks any substantial

basis and petitioners believe dismissal of that claim is justified.

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may require." *Watts, Watts & Company, Ltd. v. Unione Austriaca Di Navigazione,* 248 U.S. 9 at 21 1918).

If this Court finds that the District Court had jurisdiction of Mrs. Berg's Title VII claims, petitioners believe the District Court's summary judgment should be reversed and the case remanded for proceedings consistent with the decisions in *General Electric Co. v. Gilbert, Geduldig v. Aiello,* and *Cleveland Board of Education v. LaFleur.*

Dated, March 7, 1977.

Respectfully submitted,

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(Appendix A Follows)

APPENDIX A

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(b):

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation

thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

42 § 2000e-5(e):

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(f)(1):

. . .

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The

person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under a subsection (c) or (d) or this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

. . .

42 U.S.C. § 2000e-5(f)(2):

Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney

General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

29 C.F.R. § 1601.8:

Such charge shall be in writing and signed, and shall be sworn to before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths, and take acknowledgements. Charge forms are available to all persons from all offices of the Commission. Appropriate assistance in filling out forms will be rendered to aggrieved persons or persons filing charges on their behalf by personnel of the Commission.

29 C.F.R. § 1601.25b(c):

(c) At any time after the expiration of one hundred and eighty (180) days from the date of the filing of a charge or upon dismissal of a charge at any stage of the proceedings, an aggrieved person may demand in writing that a notice issue pursuant to § 1601.25, and the Commission shall promptly issue a notice, and provide copies thereof and copies of the charge to all parties.

. . .

29 C.F.R. § 1604.10(b):

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

California Education Code § 13456:

The governing board of any school district shall provide for such leave of absence from duty as it deems appropriate for any female employee of the district who is employed in a position requiring certification qualifications and who is required to absent herself from her duties because of pregnancy or convalescence following childbirth, and shall adopt reasonable rules and regulations prescribing the manner of proof of pregnancy, the point during the course of the pregnancy at which leave of absence shall be taken, and the length of time for which the leave of absence shall continue after birth of the child. Anything in Sections 13467 and 13469 to the contrary notwithstanding, the board may also provide in the rules and regulations whether

leave granted under this section shall be with or without pay and, if with pay, the amount, if any, to be deducted from the salary due the employee for the period in which the absence occurs.

Nothing in this section shall be construed so as to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy.

The leave provided for in this section is in addition to any other leave provided for by law.

This section shall not be construed as requiring the governing board of a school district to grant leave under this section only with pay.

California Education Code § 13456 (effective, January 1, 1976):

The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.

Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district.

Except as provided herein, written and unwritten employment policies and practices of any

school district shall be applied to disability due to pregnancy or childbirth on the same terms and conditions applied to other temporary disabilities.

This section shall be construed as requiring the governing board of a school district to grant leave with pay only when it is necessary to do so in order that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury, or disability.

California Education Code § 13468:

Every person employed five days a week by a school district in a position requiring certification qualifications shall be entitled to 10 days' leave of absence for illness or injury and such additional days in addition thereto as the governing body may allow for illness or injury, exclusive of all days he is not required to render service to the district, with full pay for a school year of service. A certificated employee employed for less than five school days a week shall be entitled, for a school year of service, to that proportion of 10 days' leave of absence for illness or injury as the number of days he is employed per week bears to five and is entitled to such additional days in addition thereto as the governing board may allow for illness or injury to certificated employees employed for less than five school days a week; pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the

school year. If such employee dos not take the full amount of leave allowed in any school year under this section the amount not taken shall be accumulated from year to year with such additional days as the governing board may allow.

The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purposes of this section. Such rules and regulations shall not discriminate against evidence of treatment and the need therefor by the practice of the religion of any well-recognized church or denomination.

Nothing in this section shall be deemed to modify or repeal any provision of law contained in Article 3 of Chapter 6 of Division 3 of the Health and Safety Code.

The provisions of Section 13467 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any such employee five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT, RICHMOND BOARD OF EDUCATION, and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other similarly situated female employees of the Richmond Unified School District,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT, RICHMOND BOARD OF EDUCATION, and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other similarly situated female employees of the Richmond Unified School District,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

I. Did the Court of Appeals err in its determination that the District Court had jurisdiction of the subject matter of respondent's Title VII claims?

II. Consistent with Title VII's prohibition against sex-based discrimination in employment, may an employer classify its pregnant employees as disabled for purposes of ordering extraordinary physical examinations and imposing compulsory leave dates, while it classifies these same persons as not disabled for the purpose of refusing to pay them accumulated sick leave earnings?

III. Does this Court's decision in *General Electric Company v. Gilbert* permit employers to discriminate against women on account of pregnancy?

STATEMENT OF THE CASE

As of November 15, 1972, respondent Mrs. Berg was a pregnant schoolteacher, employed by petitioner Richmond Unified School District (hereinafter, the "School District") (A. 109). The School District then had and enforced a written policy that required every permanent certificated employee, such as Mrs. Berg, to commence "maternity leave" no later than the first day of the seventh month of her pregnancy. (A. 36). Simultaneously, the School District had and enforced an unwritten policy that foreclosed a pregnant employee from receiving accumulated sick leave compensation for days of actual disability due to pregnancy. (A. 8, 88). The alleged sex-discriminatory nature and effect of those policies was the subject of an E.E.O.C. charge signed by Mrs. Berg on November 15, 1972, and received by the E.E.O.C. on November 17, 1972. (A. 109).

On November 29, 1972, the petitioner Richmond Board of Education (hereinafter, the "Board") convened, and held a discussion concerning the School District's compulsory maternity leave policy. Petitioner Superintendent W. W. Snodgrass (hereinafter, the "Superintendent") observed that

> ". . . several court cases across the United States have concluded that determination of the starting date for maternity leave is a matter to be determined between the employee and her physician . . ."
>
> (A. 17).

While the Superintendent noted that "[s]ome California school districts have adopted such a policy" (A. 17), the Superintendent recommended to the Board that it retain the seventh month leave policy, and adopt an "interim" policy requiring every pregnant employee who wished to work beyond the start of the seventh month to seek an extension from District officials (A. 17-18). The Assistant Superintendent of Personnel, Mr. Teese, stated that:

> "[t]he basic reason behind the beginning of maternity leave at the start of the seventh month . . . was to protect school districts from lawsuits that might evolve from injuries to teachers . . ."
>
> (A. 18).

Next petitioner the Superintendent observed that:

> ". . . only in recent months had teachers objected to the present requirements because of the publicity given to court cases . . ."
>
> (A. 19-20),

and he reported that the sole motivation for the proposed "interim" policy was "litigation". (A. 20).

At a meeting of the Board on December 13, 1972, the proposed "interim" policy was adopted, requiring every pregnant employee who was medically advised by her own physician that she could continue to work beyond the compulsory leave date of the District to apply to District officials for treatment as an "exception" to its mandatory leave policy (A. 21-24). Implementation of the policy was left to Assistant Superintendent Mr. Teese, who rejected Mrs. Berg's request that she be permitted to follow the advice of her own physician that she could continue working until the date of her delivery, by a letter dated December 27, 1972 requiring Mrs. Berg to submit to an examination by a District-selected physician (A. 28) and warning Mrs. Berg that:

> ". . . [s]hould a District physician recommend the extension of leave, the District would still reserve the right to commence the leave earlier should liability or educational program become a consideration".
>
> (A. 28).

At all times relevant hereto, petitioners maintained a dualistic scheme of treatment of pregnant teachers, presuming them to be disabled and requiring them to submit to District doctors' examinations and to the final discretion of the District's officials as to their leaves if they sought to resist the presumption of disability (A. 16-24, 28), for leave purposes, while characterizing pregnancy-related periods of disability

as not compensable for purposes of payment of accumulated sick leave (A. 8, 88).

On or about January 9, 1973, counsel for Mrs. Berg sent a letter to Assistant Superintendent Mr. Teese, informing him that Mrs. Berg sought to follow her own physician's advice as to leave and that counsel viewed the compulsory leave and physician's examination requirement for pregnant employees, combined with denial of accumulated sick pay for pregnancy-related disabilities, as constituting a violation of Mrs. Berg's constitutional and statutory rights. (A. 29-33). In that letter, Mrs. Berg's counsel invited petitioners' agents to discuss the matter with her as soon as possible, if the necessity of litigation were to be avoided. (A. 33). No response to this letter of any kind was made by any of petitioner's agents.

Accordingly, on February 5, 1973, a complaint was filed in the District Court on behalf of Mrs. Berg and a purported class of female employees, alleging that petitioners' policies deprived these female persons of fair and equal treatment under color of law, in violation of the Fourteenth Amendment and 42 U.S. Code § 1983, and that petitioners' policies regarding pregnancy unlawfully discriminated against these female persons in violation of Title VII of the U.S. Civil Rights Act of 1964, as amended in 1972, 42 U.S. Code § 2000e et seq. (A. 5-8, 11, 12).

On February 21, 1973, a notice of Mrs. Berg's right of civil action under Title VII was issued by agents of the United States Department of Justice. (A. 80-81). On February 22, 1973, after briefing and

argument by the parties, the District Court ordered that the School District, Board and Superintendent be enjoined from compelling Mrs. Berg to take any leave for pregnancy other than a leave "when deemed necessary by [Mrs. Berg] and her physician". (Petition for Certiorari, App. C, pp. 30-34). The District Court specifically found that if it did not act to enjoin petitioners, they would force Mrs. Berg to begin leave on February 23, 1973. (Petition for Certiorari, App. C, p. 31). The District Court grounded its order upon a finding of irreparable injury absent injunction and upon a determination of the likelihood of Mrs. Berg's success on the merits of claims made pursuant to 42 U.S. Code § 1983 and the Fourteenth Amendment. (Petition for Certiorari, App. C, pp. 31-33).

On February 22, 1973, Mrs. Berg's counsel informed the District Court that Mrs. Berg's notice of right of action had been authorized by the U.S. Attorney General but was not yet sent out. (A. 78). On March 16, 1973, counsel for Mrs. Berg filed a copy of the notice of right of action with a supplemental memorandum regarding the District Court's subject matter jurisdiction as to Mrs. Berg's Title VII claims. (A. 1, 79-80). Each of petitioners' successive motions to dismiss Mrs. Berg's Title VII claims for alleged lack of subject matter jurisdiction, based upon the lack of the notice of right to sue, was filed after the March 16, 1973 filing of the notice of right of action. (A. 1-2, 92-93). The District Court refused to order that Mrs. Berg's Title VII claims be dismissed and refiled due to the issuance of the notice after filing of the complaint. (Petition for Certiorari, App. C, pp. 35-38). Instead, on June 25, 1973, the District Court granted Mrs. Berg's motion for leave to supplement her complaint to allege the issuance of the right-to-sue notice to her on February 21, 1973. (A. 94-95).

Both parties moved for summary judgment in this action. (A. 99, 106). On August 20, 1973, the District Court heard argument upon those motions, and it granted Mrs. Berg's motion for summary judgment. (A. 120). On August 31, 1973, the District Court filed a memorandum opinion, indicating that its order of summary judgment in favor of Mrs. Berg and a prospective class, certified pursuant to F.R.C.P. Rule 23, was grounded solely upon Title VII. (Petition for Certiorari, App. C, pp. 39-45). Judgment in favor of Mrs. Berg and a prospective class was entered by the District Court on December 5, 1973 (A. 4), and petitioners timely appealed to the Court of Appeals For the Ninth Circuit, which rendered an opinion affirming the judgment below on December 9, 1975 (Petition for Certiorari, App. A, pp. 1-11).

As of January 1, 1976, petitioners became subject to section 13456 of the California Education Code, which requires governing boards of school districts to provide for certificated employees' leaves due to pregnancy, miscarriage, childbirth and recovery therefrom by permitting the length and date of such leaves and date of return therefrom to be determined by the employee and her doctor, and further requiring governing boards to grant leaves with pay for pregnancy-related disabilities where necessary to assure

". . . that leaves of absence for disabilities caused or contributed to by pregnancy, miscarriage, or childbirth be treated the same as leaves for illness, injury or disability".

(Petition for Certiorari, App. D. pp. 52-53).

SUMMARY OF ARGUMENT

I. The District Court's subject matter jurisdiction of Mrs. Berg's Title VII claims was properly grounded upon a timely filed E.E.O.C. charge and a valid notice of Mrs. Berg's right of action, issued by the Attorney General after determination by the Department of Justice that it would not file suit on Mrs. Berg's behalf. The absence of notarization upon the E.E.O.C. charge in no manner defeats the purpose of Title VII, 42 U.S. Code §2000e-5(b), in that the charge was truthful and in that the E.E.O.C.'s promised assistance in finding a notary was not provided. Although the District Court had and exercised jurisdiction of the subject matter of Mrs. Berg's constitutional claims when it issued a preliminary injunction to prevent petitioners from forcing Mrs. Berg's leave, the Court of Appeals' interpretation of Title VII, permitting the exercise of subject matter jurisdiction to prevent violations of the Act in a limited class of cases where irreparable injury is imminent and where a great likelihood of success on the merits is shown, provides valid independent grounds for the District Court's jurisdiction. The Court of Appeals in this action correctly determined that the District Court was not required to order a *pro forma* dismissal and refiling of the part of Mrs. Berg's complaint per-

taining to Title VII, once her notice of right of action was issued. *Cf. Love v. Pullman Co.,* 404 U.S. 522, 526-527 (1972).

II. Operating in tandem, petitioners' policies governing pregnancy and childbirth discriminate on account of sex in violation of Title VII. While compelling pregnant women to depart *at whatever time* the School District's officials choose, and requiring women to submit to extraordinary medical examinations, the results of which petitioners reserve the "right" to ignore, based upon the image of these women as irrational and disabled, petitioners without reason deny these same persons the use of their earned sick leave pay during periods of actual disability due to pregnancy. *General Electric Company v. Gilbert,* 429 U.S. ....., 97 S. Ct. 401 (1976) does not hold that a scheme of treatment of employees such as the one at issue herein, which discriminates against women both by its stereotypical design and by its economically damaging effects, passes muster under Title VII simply because it is aimed at pregnant women.

III. Petitioners, acting with full knowledge of the constitutional rights of pregnant teachers to individualized, nondiscriminatory treatment (A. 17-20), deliberately engineered a policy, compelling teachers who were medically advised that they could work beyond petitioners' favored date, to submit to a District-selected physician's examination; moreover, this policy's bottom line consisted of petitioners' assertion of a right to select and enforce leave commencement dates, in all cases, without regard to any physician's

advice including their own, if they so chose (A. 28, 47-49). Petitioners' effort to justify this policy, which is far more extreme in its arrogation of final authority to the employer than the policies found violative of Fourteenth Amendment due process in *Cleveland Board of Education v. LaFleur* and *Cohen v. Chesterfield County School District,* 414 U.S. 632 (1974), rests wholly upon a stereotype of the women thereby affected as irrational persons who are incapable of finding and respecting their own good medical advice, and who are disabled, awkward, uncertain and ill-advised as a group. (A. 52-56). The petitioners' discriminatory treatment of pregnant women, for purposes of mandatory leave and examinations, cannot pass muster under 42 U.S. Code §2000e-2(a)(1) and (2).

IV. At no point in this litigation have petitioners offered any reason, much less the legitimate nondiscriminatory one that they were required to offer, according to *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973), to explain their unwritten policy of rejecting accumulated sick pay claims for periods of disability arising from pregnancy. In the context of a motion for preliminary injunction in at least one similar case, the employer's failure to provide a reason for such conduct was held to support the employee's claim under the equal protection clause of the Fourteenth Amendment. *Bravo v. Board of Education of the City of Chicago,* 345 F.Supp. 155, 159 (N.D. Ill. 1972). Furthermore, petitioners' affording of paternity leave without loss of pay as a part of the selfsame scheme that compels maternity leave without pay

evidences petitioners' fundamentally sex-discriminatory outlook upon the rights of its male and female employees. Policies such as those at issue herein, which tacitly or expressly assume that men are the workers and wage-earners and that women and their families are tended financially by men, constitute unlawful sex-based discrimination wherever such policies operate to deny equal opportunity to women in the context of employment. 42 U.S. Code §2000e-2(a)(1) and (2). Respondent submits that petitioners' refusal, upon cross-motions for summary judgment, to provide any showing of a legitimate nondiscriminatory reason for petitioners' denial of accumulated sick pay earnings for days of actual disability due to pregnancy, constitutes an irremediable failure of proof, entitling respondent to affirmance of the judgment entered below, establishing the illegality under Title VII of petitioners' refusal to compensate female employees' claims to accumulated sick pay for days of disability caused by pregnancy.

ARGUMENT

I. PETITIONERS' SUNDRY JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

Petitioners in this action have sought to find "flaws" in the record, and to magnify them into purported defects in the jurisdiction of the District Court as to the subject matter of respondent Mrs. Berg's Title VII claims. As discussed hereinbelow, those efforts by petitioners to create impairments in the District Court's subject matter jurisdiction are unsupported

both by the language of the Act itself and by Title VII case decisions. Moreover, respondent contends that the wholly unreasonable nature of petitioners' jurisdictional arguments becomes obvious when it is considered that, on the one hand, petitioners contend that Mrs. Berg's E.E.O.C. charge was filed too soon and, on the other hand, that Mrs. Berg's notice of right of action upon said charge was issued too late. In short, petitioners seek to undermine Title VII's reach in exigent situations.

A. Mrs. Berg's E.E.O.C. charge was not premature, and the lack of notarization upon it should not be held to constitute a jurisdictional defect as to her Title VII claims.

As of November 15, 1972, when Mrs. Berg made and signed her E.E.O.C. charge, she was more than five (5) months pregnant; by this fact, Mrs. Berg then was subject to a written regulation of petitioners that compelled her to take leave from her employment some five (5) weeks later. (A. 16, 109). Nevertheless, petitioners assert that Mrs. Berg should have been required to wait to file her charge as to their compulsory leave policy until the date on which she was to be compelled to leave, contending that Mrs. Berg cannot be deemed to have been "aggrieved", in the terms of 42 U.S. Code § 2000e-5, until such occurrence.

That argument by petitioners resists recognition of the fact that the E.E.O.C. charge was filed by Mrs. Berg at a time when Mrs. Berg was directly and positively "aggrieved" within the meaning of the Act, because she was an "employee" of petitioner School

District, 42 U.S. Code § 2000e(f), who by virtue of pregnancy was personally subject to the policies of which she complained in her charge. (A. 109). By contrast, the plaintiff in *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971), cited by petitioners in support of their contention that Mrs. Berg was not "aggrieved" when she filed her E.E.O.C. charge, was found to lack standing to bring his Title VII class action because he had retired from the defendant's employ prior to filing suit.

Petitioners' claim that Mrs. Berg's E.E.O.C. charge was "premature" until she actually was forced to take leave also ignores the powers conferred by Title VII, which enable District Courts to *prevent* threatened violations of the Act, by means including issuance of injunctive relief where necessary. 42 U.S. Code § 2000e-5(g); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *U.S. v. Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969). This statutory provision and the cases broadly interpreting it would lose all meaning for purposes of *preventing* Title VII violations if, as urged by petitioners herein, employees first are required to suffer the entire injury sought to be prevented before filing charges.

Petitioners also contend that the District Court in this action lacked jurisdiction of the subject matter of Mrs. Berg's Title VII claims because the E.E.O.C. charge signed[1] by Mrs. Berg was not notarized. Under

[1]Petitioners concede that Mrs. Berg did sign below the statement, "I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief" (A. 109), stating that "[t]he charge purports to be under oath". (Brief of Petitioners, p. 3).

the circumstances of the instant case, in which petitioners continuously have failed to show that the absence of notarization of Mrs. Berg's signature in any sense has prejudiced them, and in which the E.E.O.C.'s express promise to assist Mrs. Berg in finding a notary, printed upon her charge, was not fulfilled (A. 109), respondent submits that to interpret the absence of notarization upon Mrs. Berg's E.E.O.C. charge as undermining the District Court's Title VII jurisdiction would loft form over substance, in ignorance of the remedial object of Title VII itself. *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972).

Petitioners' reliance, upon the case of *E.E.O.C. v. Appalachian Power Co.*, ... F. Supp. ....., 13 E.P.D. ¶11,293 (W.D. Va. 1976) for support of a contrary determination, is misplaced. In that case, one of the E.E.O.C.'s own Commissioners failed to swear to a charge, on the basis of which a suit by the E.E.O.C. was commenced, under circumstances that caused the District Court to observe that the Commissioner's charge, had it been sworn to, might have been sworn to falsely in part. It is central to the distinction between *E.E.O.C. v. Appalachian Power Co.* and the case at bar that the E.E.O.C.'s fault in failing to assist Mrs. Berg in having her charge notarized, when on the face of the charge E.E.O.C. promised to do so (A. 109), should not be attributed to Mrs. Berg, whether or not the E.E.O.C.'s fault should be attributed to itself, in cases like *Appalachian Power Co., supra.* Furthermore, wholly in contrast to the charge in *E.E.O.C. v. Appalachian Power Co.*, there is neither

evidence nor inference supporting the idea that Mrs. Berg's E.E.O.C. charge was false in any detail.

If Congress' purpose in amending 42 U.S. Code § 2000e-5(b) to require E.E.O.C. charges to be filed under oath or affirmation was to prevent filing of false charges to the detriment of the charged parties, then plainly that purpose has not been disserved in the case bar, because Mrs. Berg made and signed a truthful charge to the E.E.O.C. in this action. For this basic reason, respondent's counsel contends that the matter of the lack of notarization upon Mrs. Berg's charge correctly was disposed of by the Court of Appeals' effective[2] refusal to characterize this "flaw" as a jurisdictional defect.

B. The District Court's denial of petitioners' motion to dismiss for lack of subject matter jurisdiction was proper.

Petitioners argue that the letter, carrying notice to Mrs. Berg of her right of civil action under Title VII (A. 80-81), was issued too soon by the Department of Justice and was filed too late in the District Court. Both of these mutually anomalous arguments of petitioners are without legal foundation.

Contrary to petitioners' representation that Title VII disallows issuance of a notice of right of action prior to the one hundred and eightieth (180th) day after the charge is filed, 42 U.S. Code § 2000e-5(f)(1) requires in relevant part that ". . . if within one hun-

[2]In the Circuit, petitioners pointed out the lack of notarization (Brief for Appellants, pp. 10, 16), but they cited no authority rendering it a jurisdictional defect. Perhaps this accounts for the Court of Appeals' omission of any discussion of this matter in its opinion.

dred and eighty (180) days from the filing of such charge . . ." the Attorney General has not filed a civil action or entered into a conciliation agreement upon the said charge, notice of the charging party's right of action *shall* be issued upon the party's request. Nothing in 42 U.S. Code § 2000e-5(f)(1) prohibits the procedure followed by the Department of Justice in the case at bar, consisting of a determination that the Department would not proceed upon the charge, followed by prompt issuance of notice to Mrs. Berg as to her private right of action, especially in light of the urgent need for an action for preliminary injunctive relief to prevent Mrs. Berg's employer from forcing her to leave. (Petition for Certiorari, App. C, p. 31).

The attempt by petitioners to characterize the issuance of a "right-to-sue" letter to Mrs. Berg on February 21, 1973 as part of an unduly hasty flight to the federal courthouse ignores the record fact that Mrs. Berg's counsel's effort to avoid suit, by a letter sent to petitioners' agents in early January, 1973 (A. 29-33), was rendered futile by petitioners' choice not to respond, apparently on the ground that they did not know that the letter from Mrs. Berg's counsel actually was from Mrs. Berg's counsel (A. 88). Petitioners' argument that the expeditious issuance of Mrs. Berg's notice of right of action interfered with their opportunity to correct their compulsory leave policy to comport with Title VII further is betrayed by the factual record in this action, showing that as of *November 29, 1972,* more than two months before Mrs.

Berg filed suit, the petitioners were aware of claims of sex discrimination by pregnant employees who were affected by their policies. (A. 17-20). Mrs. Berg's suit was filed on February 5, 1973, at a time when she was informed that she was approximately seven and one-half (7½) months pregnant and was imminently subject to compulsory leave. (A. 16). Instead of permitting pregnant teachers as a group to abide by their own physicians' advice as to duration and commencement of leave, as Superintendent Snodgrass himself observed was the gist of the relevant case law as early as November 29, 1972 (A. 17), petitioners chose to elaborate a new series of compulsions upon the leave choices of their pregnant employees (A. 17-24, 47-51). It would strain truth itself to conclude that these petitioners, who were well-informed of the nature of pregnant employees' complaints concerning their compulsory leave policy as of November, 1972, were deprived of any opportunity to mend their ways under Title VII before Mrs. Berg filed suit on February 5, 1973, seeking to prevent a compelled departure from her employment contrary to her own physician's advice. (Petition for Certiorari, App. C, pp. 30-31).

C. The Court of Appeals' interpretation of Title VII's provisions governing subject matter jurisdiction in certain emergency cases stands in full conformance with the Act itself, and with case law defining jurisdictional prerequisites to suit.

Petitioners' labyrinthine arguments to this Court, positing that the interpretations of subject matter jurisdiction under Title VII rendered by the Ninth Cir-

cuit in this action is greater in scope than the Act permits, are unsupported by Title VII itself. Title VII authorizes the bringing of suits by the E.E.O.C. (and, until March 24, 1974, by the Attorney General, in cases involving certain governmental employers, 42 U.S. Code § 2000e-6(c)) *prior* to final disposition of underlying charges, "[w]henever . . . prompt judicial action" is necessary. 42 U.S. Code § 2000e-5(f)(2). In the case at bar, the Court of Appeals determined that "[i]n a limited class of cases such as this one", where both the threat of irreparable injury and a high probability of success on the merits are shown, an action by a charging party seeking preliminary injunctive relief is authorized under Title VII, once the charge is filed. (Petition for Certiorari, App. A, p. 6). Petitioners have not cited a single Title VII authority—within the statute and its history nor within its judicial precedents—that challenges this conclusion by the Ninth Circuit.

Instead, petitioners (and *not* the Courts below) confuse the District Court's subject matter jurisdiction, pursuant to 28 U.S. Code § 1343, as to Mrs. Berg's claims grounded upon 42 U.S. Code § 1983, with the District Court's wholly separate and distinct jurisdiction of the subject matter of Mrs. Berg's Title VII claims. (Brief of Petitioners, p. 23). In the case at bar, the District Court had jurisdiction of the subject matter of Mrs. Berg's § 1983 claims from the date of filing of her complaint, and it issued a preliminary injunction on the basis of that subject matter jurisdiction. (Petition for Certiorari, App. A, pp. 4-6).

Petitioners in this action consistently have resisted the recognition that the two "jurisdictional prerequisites" to the filing of a Title VII action by a charging party or parties (*to wit,* timely filing of a charge and receipt of a notice of right of action) are not absolute. Rather, these "prerequisites" are the product of judicial interpretation of Title VII, and not of any express declaration as to what constitutes jurisdictional prerequisites in the language of the Act itself. By resisting this recognition, petitioners next seek to recharacterize the Court of Appeals' interpretation of Title VII jurisdiction in the case at bar as a "departure" from the will of Congress as to *when* District Courts shall have jurisdiction of the subject matter in Title VII cases. The fact remains that, while Congress clearly set up administrative procedures preliminary to the bringing of Title VII cases, each of which was followed in the case at bar, nowhere in Title VII did Congress state, as petitioners wish, that a District Court may not issue a preliminary injunction to prevent Title VII's violation until after the E.E.O.C. sends a letter to an aggrieved person who has filed a charge, nor that issuance of such a letter within two and one-half (2½) weeks after suit is commenced on the independent jurisdictional bases of Title VII and section 1983 requires the complaint to be dismissed and refiled, rather than being supplemented pursuant to F.R.C.P. Rule 15(d), as was ordered in the case at bar. (A. 94).

In *Stebbins v. Continental Insurance Co.'s.,* 442 F.2d 843, 845-846 (D.C. Cir. 1971), the Court of Appeals determined in pertinent part that:

> ". . . *in the absence of special circumstances* [e.g. hardship to plaintiff], the notice of right to sue is a jurisdictional prerequisite to suit". (emphasis added).

Unlike the plaintiff in *Stebbins, supra,* respondent Mrs. Berg filed a charge and sought issuance of a notice of her right of civil action, in emergency circumstances. (A. 84-86, 109). The fact that the District Court validly granted Mrs. Berg leave to supplement her Title VII claims, by filing of the notice shortly after filing of the complaint, hardly imports a jurisdictional defect, whether viewed in terms of the *Stebbins* rule cited above or in terms of the language of Title VII itself.

II. PETITIONERS' TREATMENT OF PREGNANT EMPLOYEES IS BOTH DESIGNEDLY AND EFFECTIVELY SEX-DISCRIMINATORY, IN VIOLATION OF TITLE VII.

Petitioners deliberately have whipsawed pregnant employees as a matter of policy. Having full knowledge that their pregnant employees sought treatment as individuals (A. 20), petitioners propounded a mandatory leave policy that automatically treats these women as disabled, on the basis of a so-called "average" (A. 19, 47, 52-55) and as so irrational that they cannot find and follow proper, individualized medical advice as to their health needs relative to their employment (A. 28, 47). Simultaneously, petitioners characterized all members of this same group as not disabled for purposes of receiving accumulated sick pay, on the irreconcilable ground that "normal pregnancy is a natural condition and not an illness" (A. 56).

This whipsaw, designed and enforced by petitioners against their pregnant employees, violates Title VII. Both its purpose and its effect are to compel the making of certain significant employment-related choices for all women on the basis of a sex-stereotyped image of the "average" woman (A. 53-56), while at the same time to deny women equal opportunity in the receipt of earned sick pay for disabilities arising from pregnancy and childbirth, contrary to that selfsame expedient "average" of the disabled pregnant employee (A. 8, 88).

While the respondents in the case of *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401 (1976), were determined by a majority of this Court not to have shown that their employer's exclusion of pregnancy-related disabilities from insurance coverage purposively of effectively discriminated on account of sex, respondent in this action submits that the instant record shows both purposive and effective sex-based discrimination in petitioners' treatment of pregnant employees.

In order to justify compulsory leave and mandatory physical examinations, for the class of pregnant women whose own doctors determine different dates for commencement of leave than various agents of petitioners prefer, *and for no other class of employees,* petitioners assert that *all* pregnant women are "likely to be temporarily disabled" (A. 53), are "often awkward and uncertain when standing or walking" (A.

54), and so forth (A. 54-55), and that the medical advice of this group's doctors as to leave thus must be disregarded by the School District's officials (A. 56).

Petitioners' categorical interferences with the medically advised decisions of pregnant employees as a group, based upon the express proposition that *all* such persons are so disabled in their last month that they must be compelled to take leave, then *if not before* and regardless of their own individualized medical advice (A. 56), can only be reconciled with petitioners' denial of accumulated sick leave pay to these same persons upon the purported ground that they are not disabled (A. 56), by reference to petitioners' discriminatory intent. In this scheme of petitioners, women are a part of the workforce who may be forced to submit to extraordinary examinations and to take leave, regardless of their own doctors' advice, under the pretext of petitioners' protection of them, their foetuses and their students (A. 47-51), while being denied the sick leave pay that their years in service have earned them, upon the grounds that these women actually are not disabled, whether during delivery, recuperation after childbirth, or otherwise.

In the equal protection case of *Washington v. Davis,* 426 U.S. 229, 253 (1976), Mr. Justice Stevens observed in relevant part in a concurring opinion that: ". . . the most probative evidence of intent [is] . . . objective evidence of what actually happened . . ." In the case at bar, what actually happened must be measured by petitioners' own statements, simultaneously insisting upon retaining the prerogative of compulsory maternity leave under a guise of "protection", while refusing to pay sick benefits to those who had been deemed "disabled" in order to justify compulsory leave. These facts evidence petitioners' overarching purpose to discriminate against certain women employees, by manipulating the terms and conditions of their employment to the detriment of their economic equality and human liberty, under the pretext of "protecting" these women, their offspring and their students. (A. 47-56). This transcendent discrimination, permeating every facet of petitioners' treatment of pregnant employees, was held below to violate Title VII. Petitioners have offered this Court no good reason to find that holding incorrect.

As argued hereinabove, the double-edged stereotype of pregnant women that petitioners' policies wield can only be explained by reference to an impermissible purpose to discriminate. Moreover, the discriminatory effects of petitioners' policies, working in tandem, are equally obvious: the pregnant female who is advised by her own physician that she may work beyond petitioners' favored date of leave is at petitioners' mercy: she must try to prove both to a District-selected physician (A. 26, 47) and to a District official (A. 47; Petition for Certiorari, p. 61) that she is an "exception" to the "average" of disability (A. 56), while she is denied the sick pay benefits that she has earned by means of years in service, for every day of disability that is actually suffered by her (A. 8, 88).

This case is altogether different from the case of *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401 (1976), in several critical respects. Foremost among these differences is the failure of petitioners at any stage of this action to offer a basis for their contradictory treatment of pregnant employees. Unlike the government in *Geduldig v. Aiello,* 417 U.S. 484 (1974), and unlike the employer in *General Electric Co., supra,* petitioners herein have offered no legitimate, nondiscriminatory reason whatsoever for their policies, as required by this Court in *Geduldig v. Aiello* (". . . lawmakers are constitutionally free to include or exclude pregnany from the coverage of legislation such as this *on any reasonable basis* . . .", 417 U.S. at 496-497, n. 20 (emphasis added), and in *General Electric Co., supra.*

Whatever the distinctions between Fourteenth Amendment and Title VII standards as to a proper defense to an initial showing of discrimination may be, petitioners have failed to meet *any* standard of defense in this case. Not only have petitioners failed to rebut the record showing that their unwritten policy prohibiting payment of earned sick leave to a class of women is a matter of whim, and not of any demonstrable fiscal or other considerations, such as in *Geduldig v. Aiello, supra.* In the entire course of proceedings upon this action, petitioners have not uttered a single word in justification or even in explanation of their policy of refusing to pay earned, accumulated sick leave for actual disabilities caused by pregnancy.

Furthermore, petitioners' proposed reasons for compelling maternity leave and for ordering physical examinations essentially contradict their actions in refusing to afford accumulated sick leave earnings in this context. While professing to "protect" women and their foetuses by the steps of compelling their leave and ignoring their own physicians' advice, petitioners are taking away the livelihoods of women forced out of work, able and disabled alike, by refusals to pay accumulated sick leave earnings for days of actual disability. Surely this contradictory treatment of the subject class cannot be favorably compared to a situation in which the decision-maker proves the existence of some reason, of whatever strength, for its policy.

Title VII requires more, in the view of this Court. The employer must show a legitimate nondiscriminatory reason for its policies, once the complainant's *prima facie* showing is made. *McDonnell Douglas Co. v. Green,* 411 U.S. 792, 802 (1973). By proving that petitioners summarily refused to afford accumulated sick pay to a class of women because they are "not disabled", while forcing leaves and examinations because they are "disabled", respondent submits that she offered a *prima facie* showing that Title VII was violated by petitioners' treatment of the class of women herein. Petitioners then rested on their supposed prerogatives to treat women employees as they pleased (A. 105-121). Respondent respectfully submits that petitioners' complete failure to put on any

defense,[a] after respondent's factual and legal showing of entitlement to summary judgment under Title VII, fully supports the affirmance by this Court of the judgment entered below against petitioners.

III. WITHOUT REGARD TO THE WHIPSAW NATURE AND CONSEQUENCES OF PETITIONERS' PREGNANCY POLICIES OPERATING TOGETHER, PETITIONERS' COMPULSIONS AS TO THE LEAVE CONDITIONS OF PREGNANT EMPLOYEES VIOLATE TITLE VII.

The two features of petitioners' leave policy that respondent contends manifestly has discriminated against Mrs. Berg and her class on account of sex are (1.) the compulsion upon every woman to take leave at a given time, and the further compulsion upon any woman who seeks to work beyond the District's favored date to be examined by a doctor not of her own selection, but of the District's, who will decide regardless of her attending physician's advice when she shall depart for leave (A. 28, 47; Petition for Certiorari, p. 60); (2.) the reservation to District officials of a power to compel pregnant employees to commence leave at any time, in the caprice of those officials (A. 47; Petition for Certiorari, p. 60).

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[a] In oral argument upon the parties' cross-motions for summary judgment, petitioners' counsel refused to provide any reason to support the challenged policies (A. 114-121). The following exchange between court and counsel typifies this refusal:

> "The Court: . . . What about the summary judgment as to the individual claim? . . . Shouldn't I enter it?
>
> [Petitioners' Counsel]: I don't think Your Honor should enter it . . ."
>
> (A. 116).

As to the first of these compulsory characteristics of petitioners' policy, which respondent contends is discriminatory against women both in its purpose and in its effect in patent violation of Title VII, petitioners' sole justification consists of gross sex-stereotyping. Petitioners' compulsion upon pregnant employees to be examined by their doctor, although these persons' own physicians prescribe that they may work until a certain date, is based upon a stereotype of pregnant women as doddering, irrational fools, who must be forced away from the care and advice of their own presumptively untrustworthy attending physicians, into the unfamiliar hands of District-selected physicians (A. 28, 47-56) who will examine them and thereby decide matters such as whether these women are wearing inappropriate shoes (A. 54) and whether they are safe drivers (A. 48). Assuming *arguendo* that there may exist pregnant women in petitioners' employ who are too ill or too ill-advised to take leave for pregnancy when it is medically reasonable to do so, nothing in the record of the case at bar proves that *all* pregnant women as a class (unlike all hernia patients, all candidates for oral surgery, and so on) validly may be assumed not to know what they are doing. Respondent submits that the primary offense to Title VII accomplished by petitioners' mandatory examination and leave policies consists in their operative premise, *to wit,* that *all* women, who are under the care of doctors who disagree with District officials' notions of propriety during pregnancy, are on that basis alone to be treated as irrational persons

who must be coerced into doing what petitioners define as best for them. (A. 28, 47-56).

Petitioners' forced leave policy has been characterized by them to this Court as one "providing for individual consideration of the starting dates for maternity leave" based upon "an authoritative medical opinion . . .". (Brief for Petitioners, p. 45). The record in this action completely contradicts that characterization. By the policy's express terms, *all* pregnant schoolteachers may be compelled to commence leave *whenever* the District's officials choose. (A. 19, 47). *All* pregnant schoolteachers whose attending physicians direct that they are medically able to work during the last month of pregnancy, or any part thereof, are compelled to undergo examination by a District-selected physician. If the District's physician's opinion supports a leave date that petitioners' agents do not like, that opinion can be *overridden* by the District's non-physician officials. (A. 28, 47-51).

Central to respondent's claim that petitioner's mandatory leave, examination and departure policy, designed and applied only as to pregnancy is sex-discriminatory is the policy's embodiment of a sex-stereotyped image of pregnant school employees as a class of women who cannot make rational choices, even about the qualifications and medical advice of their own attending physicians during pregnancy (A. 28, 49, 56). The primary evidence of this stereotyping in the record, other than Superintendent Snodgrass's derogatory remark that the sole reason for pregnant

teachers' objections to the petitioners' compulsory leave policy consisted of "the publicity given to court cases" (A. 19-20), and the petitioners' continuing refusal to give pregnant employees and their own doctors the same general right to select rationally informed leave dates that other employees have, consists of the affidavit of Dr. Maxwell Thebault, which petitioners claim to be "an authoritative medical opinion" on the basis of which they divined their compulsory policy. (A. 52-56; Brief of Petitioners, p. 45). Dr. Thebault's affidavit is replete with stereotypes of pregnant women, having little more than forensic medicine to commend them to this Court over a vast array of sex stereotypes offered and rejected in other Title VII actions. *See, e.g., Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971) (stereotype of physically weak women rejected); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir. 1971), cert. den., 404 U.S. 950 (1971) (stereotype of psychologically non-nurturing men rejected); *Phillips v. Martin Marietta Corporation,* 400 U.S. 542 (1971) (stereotype of female parents as unreliable workers questioned) (per curiam).

Dr. Thebault states that in the six weeks prior to an estimated delivery, schoolteachers are "*likely* to be temporarily disabled" by ". . . urination . . . incontinency . . . false labor . . . true labor" (A. 53-54), "*often* awkward and uncertain when standing or walking" (A. 54), "*peculiarly* vulnerable to even modest elements of jostling and bumping" (A. 55), ". . . can be *expected* to have *unusual difficulty* in coping

with . . . student fights, accidents and illnesses" (A. 55), and that pregnant teachers ". . . *easily* become so disabled by [their] own movements . . . that [they] would be helpless to take any effective action" (A. 55).

If this affidavit does not amount to obvious sex-stereotyping of pregnant women, then plainly doctors are immune from sex-based prejudices. At least one federal court has held otherwise, on the issue of doctors offering stereotyped views of particular groups of females as helpless and injury-prone, in order to justify sex-based discrimination against them. *Fortin v. Darlington Little League,* 514 F.2d 344, 350 n. 5 (1st Cir. 1975).

On the basis of the kinds of generalities recited above, Dr. Thebault announces that:

> "[i]n my opinion, considering a teacher of average stamina, health and normal pregnancy, a rule *requiring her to stop working* at least six weeks prior to her estimated date of delivery would be consistent with conservative medical practice, and most specialists in obstetrics and gynecology would recommend against her continuing to work within four weeks of her estimated date of delivery."
>
> (A. 56) (emphasis added).

Historically, discriminatory treatment of women has derived in significant part from the concept that members of the female sex are inherently irrational creatures who, like children, slaves and demented persons, must be restricted and overseen by the legal

system *in loco parentis.* Professor W. Friedman has observed, in this regard, that:

> ". . . Certain natural inequalities, such as the difference in the legal status of infants and adults, or of insane and sane persons, do not touch the foundations of democracy . . .
>
> Neither the limitation of franchise or other civil rights, nor legal inequality between men and women nor between white and black races, nor differentiations in the legal positions of nationals and foreigners, are compatible with the basic legal ideals of democracy, yet all these inequalities still exist, to a greater or smaller degree."
>
> —*Legal Theory* 416 (1967).

Contributors to jurisprudence, both ancient[4] and contemporary,[5] have recognized the essential relationship between a legal view of women as an irrational, childlike class and the consequence: all women are rendered unnecessarily unequal and unfree. Respondent contends that the obvious premise of petitioners, that pregnant women as a class are incapable of making rational decisions, upon medical advice, to the same extent as do prostatectomy patients, injured skiers and every other group of employees making employment-related medical choices, makes the compulsory leave and examination policy at issue herein discriminatory on account of sex in its very design.

There are Title VII cases in which a discriminatory purpose is the sole purpose that satisfactorily explains relevant conduct or events. *See, e.g., Gibson*

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[4]*The Republic of Plato,* 145-155 (F. Cornford trans. 1966).
[5]J. Rawls, *A Theory of Justice,* 247-249 (1971).

v. Local 40, 543 F.2d 1259, 1266-1267 (9th Cir. 1976). Respondent Mrs. Berg submits that such a fact situation is presented of record in the case at bar, by virtue of the absence of any reason by petitioners for their compulsory leave and examination policy, other than the view that respondent Mrs. Berg and others who seek to continue working must be treated as irrational and ill-advised women, who are unconcerned about their health, their foetuses' health and their schoolchildren's well-being. (A. 47-56). Thus, to the extent that the element of the employer's purpose may be relevant to a determination that Title VII has been violated, respondent submits that unrebutted evidence of a sex-discriminatory purpose has been presented herein, by the statements made by and on behalf of petitioners themselves in purported justification of the leave policy herein at issue. (A. 17-20, 28, 47-56). *General Electric Co. v. Gilbert, supra,* 97 S.Ct. at 408-409.

Separate and apart from the record evidence that petitioners knowingly have whipsawed pregnant females in their employ by compelling leaves on grounds of "disability" while denying sick pay on grounds of "non-disability", the record in this action shows that Superintendent Snodgrass recommended continuation of a compulsory and non-individualized maternity leave policy to the Board, with full knowledge of the claim that such policies discriminate against women. (A. 17-20). Petitioners then sought to justify that policy in this lawsuit on the basis of sex-based stereotyping of a class of pregnant women. (A. 52-56).

Finally, respondent emphasizes that the sex-discriminatory structure and foundation of petitioners' mandatory policy is in no way legally undermined by the fact that it discriminates only against some women (those subject to pregnancy, whether voluntarily or otherwise) and not against *all* women. Title VII expressly prohibits sex-based discrimination in employment against each and every *individual* employee. 42 U.S. Code §§ 2000e(f) and 2000e-2(a)(1) and (2). Petitioners argued in the Ninth Circuit that the:

> ". . . interim maternity leave policy does not violate § 2000e-2(a)(1) and (2), *since the policy is applicable only to pregnant females and not all females.*"
>
> (Brief for Appellants, p. 19; emphasis added)

The above-quoted position of petitioners, if adopted by this Court, would spell the end to Title VII actions challenging employment discrimination aimed at one or more, but less than all, female employees. Contrary to petitioners, respondent does not understand the opinion of this Court in *General Electric Company v. Gilbert, supra,* to mean that where an employer discriminates against less than 100% of its female employees, the employer will be exempted from Title VII liability.

That the discriminatory effects of petitioners' compulsory examination and leave policies are suffered solely by women is an unembroidered fact. *Only* pregnant females as a class suffer the consequences of having to commence leaves, and to depart their employment, at times chosen not by themselves and

their doctors but by petitioners and petitioners' agents. (A. 118-119; Petition for Certiorari, App. C, p. 40). No other condition or bodily process other than pregnancy *automatically* subjects *every* person who tries to exercise a personal, medically advised choice to work beyond an arbitrary leave date to an examination by a doctor, selected not by that person but by her employer, whose opinion may be disregarded by petitioners' agents in any case. (A. 28, 47-51, 118-119). The pregnant employee who chooses to abide by her own doctor's advice, and who refuses to be examined by a doctor who is a total stranger to her individual case, acts in violation of the employer's declared policy, and risks the employer's sanction of compelled leave. (A. 28; Petition for Certiorari, App. C, p. 31).

Considered by itself, and without regard to the requirement of a District doctor's examination, the petitioner's compulsory leave policy also imposes sex-discriminatory consequences. In the case at bar, petitioners have gone substantially further than school officials went in the compulsory leave schemes found by this Court to violate the Fourteenth Amendment in *Cleveland Board of Education v. LaFleur* and *Cohen v. Chesterfield County School Board,* 414 U.S. 632 (1974). Nonetheless, invoking some favorable dictum from this Court's opinion in those cases, and ignoring this Court's statement therein that pregancy-related emergencies may be handled like all others, 414 U.S. 632 at 642, n. 10, petitioners declare that:

> ". . . [t]he School District's interim maternity leave policy provisions are valid under this Court's decision in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974)."
>
> (Brief for Petitioners, p. 45).

This statement by petitioners ignores the record fact that, unlike the school officials in *LaFleur* and *Cohen, supra,* these petitioners moved backward from a mandatory leave line, with knowledge of the case law and of the discrimination charges of women teachers (A. 17-20), to a policy asserting the School District's "right" to mandate and order leave *at any time* during pregnancy. (Compare the original policy at A. 16, to the "interim policy", set forth in the Petition for Certiorari, App. E, p. 60, providing in relevant part that "[t]he Assistant Superintendent may determine a beginning date for an employee's maternity leave *earlier or later* than 30 days before the expected date of delivery . . .") (emphasis added).

To have one's work and livelihood taken away by the determination of non-physician officials, basing their compulsions and prerogatives upon a view of pregnant women as a class of incompetents and not upon the individual woman's situation, can be termed nothing if not sex-discriminatory. In the *LaFleur* and *Cohen* decisions, this Court expressly reserved the question of the validity of pregnancy leave programs under Title VII, and relevant guidelines and regulations. 414 U.S. at 638, n. 8.

Even compulsory maternity leave policies that do not arrogate a final generalized power to the employer to choose and enforce leave commencement

dates at any time in pregnancy consistently have been found wanting by federal courts, both in the Title VII context, *see, e.g., Oakland Federation of Teachers v. Oakland Unified School District,* ..... F. Supp. ....., 10 E.P.D. ¶ 10,322 (N.D. Cal. 1975); *Vineyard v. Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974); *Newmon v. Delta Airlines,* 374 F.Supp. 238 (N.D. Ga. 1973), and in Fourteenth Amendment terms, *see, e.g., Paxman v. Wilkerson,* 390 F.Supp. 442 (E.D. Va. 1975); *Green v. Waterford Board of Education,* 473 F.2d 629 (2nd Cir. 1973); *Buckley v. Coyle Public School System,* 476 F.2d 92 (10th Cir. 1973) (reversing summary judgment to school officials); *Williams v. San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972). The policy of petitioners hardly should or can be salvaged from disposition pursuant to this line of precedents concerning the unlawfully sex-discriminatory nature of mandatory maternity leave schemes, especially given that this policy, additionally, is overtly based upon a sex stereotype of pregnant women as irrational *per se,* and given that, unlike the policies invalidated in each of the above-cited cases, the policy at issue herein expressly reserves a right on the employer's part to order leaves to begin whenever the employer chooses.

The combination of an evident sex-discriminatory design and equally evident sex-discriminatory effects places petitioners' interim maternity leave policy squarely in violation of Title VII. *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401, 408-410. In its determination that petitioners' leave policy

discriminates against women in violation of Title VII, the Court of Appeals did not err, despite its partial reliance for its conclusion upon a Guideline of the E.E.O.C. that this Court since has criticized in the distinguishable context of *G.E. v. Gilbert, supra.* Unlike *G.E. v. Gilbert,* respondent contends that petitioners' maternity leave policy was designed with knowledge of its discriminatory effects, in violation of Title VII, and respondent respectfully urges that this Court affirm the Court of Appeal's judgment in favor of Mrs. Berg and her class upon this question.

IV. PETITIONERS' UNWRITTEN POLICY DENYING ACCUMULATED SICK PAY FOR DAYS OF ACTUAL DISABILITY SUFFERED BY PREGNANT WORKERS VIOLATES TITLE VII.

The policy of petitioners that prohibits drawing upon accumulated sick pay by a worker who is disabled by pregnancy concededly is unwritten. (A. 8, 88). No pregnant employee, who believes that she may claim the requisite portion of her accumulated sick pay for a period of actual, medically certified disability caused by pregnancy, is informed to the contrary by the language of petitioners' policies governing sick leave. (A. 112-113). The fact that petitioners' policy is unwritten is relevant to its susceptibility to use as a "cover" for invidious discrimination against female workers, for the policy's informality lends itself to expansive readings against the claims of female employees. Moreover, the form of this policy stands in sharp contrast to the formal written exclusion of pregnancy-related disabilities from the insur-

ance plan challenged in *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401.

Nevertheless, at first perusal it might appear that petitioners' refusal to afford accumulated sick pay for days of actual disability due to pregnancy is governed by the view taken by a majority of this Court in *General Electric Co. v. Gilbert* that the employer is not discriminating on account of sex by refusing to afford compensation, pursuant to its insurance program, for pregnancy-related disabilities.

The resemblance between the instant case and *General Electric Co. v. Gilbert* on this issue ends at the surface. Several factual characteristics of the insurance scheme that were deemed important by this Court's majority in *General Electric Co. v. Gilbert, to wit,* the contingent nature of the value of insurance and the purported actuarial basis for risk selection, are wholly absent in the accumulated sick leave scheme in the case at bar (A. 111-113). It could reasonably be said that to the same extent that those factors caused a majority of this Court to perceive a controlling analogy in the precedent of *Geduldig v. Aiello, supra,* 417 U.S. 484, the absence of those insurance considerations in the case at bar renders the instant case most closely analogous to the case of *Turner v. Department of Employment Security,* 423 U.S. 44, 45 fn* (1975) (per curiam). Petitioners' conclusive presumption of a pregnant employee's *non-disability* for purposes of denying accumulated sick leave, surely is as vulnerable to the claim of a denial of due process as was the opposite presumption in *Turner, supra.* Respondent recognizes that the instant

action addresses not a due process claim but a Title VII claim; however, it is quite apparent that the presence of a conclusive presumption in employment, depriving persons of liberty and property in a given case, may signal not only a due process violation, but a violation of Title VII, where that conclusive presumption is aimed at the sex, race, religion or color of those it purports to govern. 42 U.S. Code § 2000e-2(a)(2).

Assuming *arguendo* that as a factual matter the earned sick pay scheme at issue herein validly may be analogized to the disability insurance scheme in *General Electric Co. v. Gilbert, supra,* the record in the case at bar does not support or reflect the idea that the prohibition of petitioners against use of accumulated sick pay for periods of disability due to pregnancy resulted from a gender-neutral risk selection process. *General Electric Co. v. Gilbert,* 429 U.S. ....., 97 S.Ct. 401, 409.

Petitioners' only effort to explain their policy in this action consisted of a reference to state law; the state law provisions to which petitioners refer do not explain their conduct. The California statute empowering school districts to enact rules governing maternity leave, as of the time of commencement of this action, declared in pertinent part:

> "Nothing in this section shall be construed to deprive any employee of sick leave rights under other sections of this code for absences due to illness or injury resulting from pregnancy."
>
> California Education Code § 13456 (Petition for Certiorari, p. 52).

Respondent submits that the above-quoted provision of California law plainly is in harmony with petitioners' Title VII duties to avoid sex-based discriminatory policies such as those challenged in this action. At least one District Court sitting in California has so ruled, in *Oakland Federation of Teachers v. Oakland Public Schools,* ..... F.Supp. ....., 10 E.P.D. ¶10,322 (N.D. Cal. 1975); that interpretation of state statutory law is entitled to some respect. *Cf. Bishop v. Wood,* 426 U.S. 341, 345 (1976).

In the case at bar, Mrs. Berg at no time has claimed a right, on her own behalf or that of any other pregnant class member, to draw accumulated sick pay for any time out of employment that is not directly and unambiguously attributable to actual disability. Indeed, the district court's permanent injunction was tailored to require the availability of earned sick leave pay only for days of actual disability (Petition for Certiorari, App. C, p. 47), thus prohibiting any claims to accumulated sick pay that are not based on the employee's actual condition of medical disability from employment.

Petitioners argue that the California statute in effect at the time that they denied accumulated sick pay for days of actual disability due to pregnancy allowed them to do so. Putting aside the principle that Title VII should be read and has been read to supersede conflicting state laws which invite or allow sex-based discrimination in employment, *see, e.g., LeBlanc v. Southern Bell Telephone and Telegraph Co.,* 460 F.2d 1228 (5th Cir. 1972), cert. den.;

(Petition for Certiorari, App. C, p. 41), respondent contends that California Education Code §13456 did not in its terms permit petitioners to refuse to pay accumulated sick leave benefits for those days in a given employee's pregnancy where there was actual, documented illness due to pregnancy. *See* §13456, quoted in relevant part above; *see also, Oakland Federation of Teachers v. Oakland Public Schools, supra.*

For Title VII purposes, petitioners' refusal to permit accumulated sick pay for days of actual disability due to pregnancy differs from the policy excluding pregnancy-related disabilities from insurance at issue in *General Electric Co. v. Gilbert, supra,* in several respects. In the case at bar, there is evidence that petitioners' refusal to afford accumulated sick pay is part of an overarching scheme of sex discrimination against pregnant schoolteachers, founded upon an invidiously discriminatory perspective upon the pregnant schoolteacher as one who must be forced to take leave because of a stereotype of her condition of "temporary disability" (A. 52-56) while being denied accumulated sick pay when she actually does become disabled, during and after delivery or otherwise (A. 8, 88).

Furthermore, there is record evidence that petitioners' refusal to afford accumulated sick leave compensation to the pregnant schoolteacher is part of a sex-stereotyped view on the part of petitioners that the father is and should be the primary breadwinner during the mother's pregnancy. While refus-

ing to afford the employee mother her earned sick pay for days of actual disability, petitioners' policy as to fathers provided that:

> "[p]aternity leave of one (1) day may be granted the male employee *without loss of pay* during or after the confinement of his wife . . ."
>
> (A. 16) (emphasis added).

This "have-a-cigar" approach to the economics of childbirth supports respondent's claim as to the sex-discriminatory purpose and effect of petitioners' denial of accumulated sick pay, in that it evinces petitioners' view that the (slight) economic loss of the father missing a day of employment due to his wife's childbirth is compensable, while the delivering mother cannot even draw her earned benefits during days of actual disability arising therefrom.

This palpably sex-based inequity in petitioners' treatment of pregnancy and childbirth may seem trivial, but respondent contends that, in the context of petitioners' maternity policies, it is probative of respondents' position that petitioners' denial of earned sick pay to pregnant employees in the case at bar is founded upon nothing but an impermissibly sex-discriminatory view of fathers as breadwinners and mothers as economic dependents, leading to sex-differential leave and pay policies in violation of Title VII. *Cf. Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975); *Frontiero v. Richardson,* 411 U.S. 677 (1973). Thus, to the extent that this Court's approach in *General Electric Co. v. Gilbert, supra,* 429 U.S. ....., 97 S.Ct. 401, 407-408, concerning the relevance

of equal protection decisions in instances where the application of Title VII's prohibitions is ambiguous, may be held to apply to the case at bar,[6] respondent observes that this Court has found governmental schemes that assume men to be breadwinners and women to be economically dependent upon their husbands, and that thereby discriminate on account of sex, to violate the equal protection guarantee.

The policy in the case at bar countenances exactly such a sex-stereotyped approach to economic rights as those condemned in *Wiesenfeld* and in *Frontiero, supra.* Petitioners assume that the father needs and deserves a day off with pay when his wife is in childbirth, while they assume that the mother (who may have earned accumulated sick leave that she expects to draw when disabled) should derive economic protection during pregnancy, not from her own earning power and employment status, but from that of her "breadwinner" husband.

Not only do petitioners' compensation schemes relative to pregnancy discriminate in purpose; the adverse effects of these schemes upon pregnant female workers are obvious. While men and women alike supposedly earn ten (10) days of sick leave pay per year of service (Petition for Certiorari, App. D, pp. 53-54) this accumulated pay is withheld from

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[6]Respondent submits that there is no such ambiguity in Title VII's prohibition against sex-based discrimination in the case at bar. Petitioners' dualistic classification of women as "disabled" for purposes of imposing burdens upon them and as "not disabled" for purposes of denying benefits to them unqualifiedly deprives these women of equal employment opportunity on account of sex. 42 U.S. Code § 2000e-2(a)(1).

women whose sick days are attributable to pregnancy (A. 8, 88).

Petitioners assert to this Court that:

> "[a]*rguably*, the entitlement to paid leave for illness or injury provided at the time of this action did not include pregnancy insofar as pregnancy is a natural condition and not an illness or injury. (Thebault affidavit, A. 56."
>
> (Brief for Petitioners, p. 43) (emphasis added).

Petitioners next admit that if their denial of sick pay "was a pretext for gender-based discrimination, or [if] it resulted in gender-based effects . . .", that denial violates Title VII. (Brief for Petitioners, p. 43).

Respondent contends that the record in the case at bar, as detailed hereinabove, displays a *prima facie* showing that petitioners' denial of accumulated sick pay was part-and-parcel of a continuing and overt scheme of sex-based discrimination against pregnant women by petitioners, which included sex-stereotyped compulsory leave, examination and return policies developed for and applied to pregnant women *only*, payments to "expectant" fathers, and an anomalous and undefended refusal to compensate in the event of periods of actual disability of pregnant women by affording accumulated sick pay benefits.

Petitioners failed to meet their Title VII burden of making a showing of a legitimate, nondiscrimi-

natory reason explaining this oppressive and economically damaging scheme of treatment of Mrs. Berg and other pregnant employees. *McDonnell Douglas v. Green*, 411 U.S. 792, 802. Unlike the employer in *General Electric Co. v. Gilbert, supra*, petitioners did not even attempt to show that the payment of accumulated sick days for illnesses or injuries caused by pregnancy would impose any additional cost upon the School District. Nor did petitioners seek to demonstrate that, despite the sex-discriminatory economics of their refusal to pay for pregnancy-related sick days, the values of sick pay benefits actually received by their employees do not vary significantly on account of sex. Instead, petitioners elected not to offer *any* reason whatsoever for this policy at the summary judgment stage.

In the quite similar case of *Bravo v. Board of Education of the City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972), the employer's complete failure to offer any reason or account for its refusal to compensate for pregnancy-related sick days caused the District Court to rule in favor of the employee's equal protection based claim for preliminary injunctive relief. In *Bravo, supra*, the District Court observed in pertinent part:

> "[t]eachers on illness leave are allowed to draw pay for their accrued sick pay days; pregnant teachers are not . . . The Board has offered no reason for these differences in benefits between teachers who are ill and those who are pregnant. Plaintiff has met her burden of showing a reasonable probability of success on her claim

> that there is no rational and substantial basis for the Board's distinction between pregnancy and other medical conditions for the purposes of determining employment benefits."
>
> 345 F.Supp. at 159.

In the case at bar, petitioners offered no rational and substantial basis for this policy at any stage of the proceedings below. On summary judgment, instead, petitioners baldly and insupportably asserted the presence of a triable issue of material fact as to whether Mrs. Berg was damaged by their policy. (A. 106). Respondent submits that, in accordance with this Court's identification of the Title VII burden of proof upon the employer, once a *prima facie* showing is made, in *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802, petitioners wholly failed to present any defense, whether cognizable under Title VII or otherwise, for their blanket unwritten policy refusing payment of accumulated sick leave compensation for days of actual illness related to or caused by pregnancy. As a result, respondent submits that the determination of the Court of Appeals upon this issue deserves affirmance by this Court.

CONCLUSION

Petitioners School District, Board and Superintendent have taken the position throughout this litigation that they freely could discriminate against pregnant women without becoming liable for discrimination on account of sex under Title VII. Accordingly, they persisted in the design and enforcement

of a series of policies that invidiously discriminated against respondent and other female employees similarly situated. Respondent respectfully contends that, upon the factual record presented to this Court, showing the recalcitrant and undefended manipulation by petitioners of statutory rights to equal employment opportunity held by female employees, this Court should conclude that the pregnancy-related policies of petitioners violated Title VII of the U.S. Civil Rights Act of 1964, as amended in 1972. For the reasons presented hereinabove, respondent urges that this Court affirm the judgment of the Court of Appeals for the Ninth Circuit, determining that petitioners' policies, compelling leaves for pregnancy at times and under conditions selected solely by petitioners, and depriving pregnant employees of earned sick pay benefits for days of actual disability due to pregnancy, constitute intentional discrimination on account of sex, in violation of 42 U.S. Code §2000e-2(a)(1) and (2), for which the judgment entered by the District Court in this action provides appropriate relief.

Dated, April 6, 1977.

Respectfully submitted,

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(With grateful appreciation for the assistance of Wendy Carson, Julia Jaurigui, and Roberta Spivek in the preparation of this Brief for Respondent.)

FOR ARGUMENT

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1069

RICHMOND UNIFIED SCHOOL DISTRICT,
RICHMOND BOARD OF EDUCATION,
and W. W. SNODGRASS,
Petitioners,

vs.

SONJA LYNN BERG, individually and on behalf of all other female employees of the Richmond Unified School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

I

MRS. BERG HAS NOT SUBSTANTIATED FEDERAL COURT JURISDICTION OF HER TITLE VII CLAIM

A. MRS. BERG HAS NOT DEMONSTRATED THE EXISTENCE OF "INJURY IN FACT" AT THE TIME HER EEOC CHARGE WAS FILED.

Mrs. Berg argues that she was "aggrieved" at the time of her EEOC charge was filed because she was

then a pregnant employee, potentially subject to the regulation of which she complained, without regard to enforcement of the regulation in her case. But 42 USC §2000e-5(e) specifically requires that charges of discrimination be filed after an alleged unlawful employment practice has "occurred," and places express limits on the time within which a charge may be filed after the "occurrence" by which a charging party is "aggrieved."

If the Court adopts the position advanced by Mrs. Berg, unlawful employment practices will have "occurred" simply by virtue of the existence of laws, regulations, or policies, regardless of their application. This will lead to anomalous results under the statute. There are undoubtedly laws, regulations and policies that have been on the books for many years and potentially affect the employment of women. If the existence of a policy, taken alone, is an occurrence justifying an EEOC charge, the right to file a charge will terminate one hundred and eighty days after the policy is adopted or becomes applicable. Arguably, this period of limitations will have expired as to then existing laws, regulations and policies, one hundred and eighty days after Title VII became effective. The Court should not adopt a theory of decision that will permit the period of limitations on EEOC charges to begin, or subject employers to EEOC proceedings, without the existence of an event at some identifiable time connecting the employer and the complaining party. Absent some conduct or act

by the District referable to her, Mrs. Berg's November 15, 1972, charge was speculative and hypothetical.

In further support of her EEOC charge, Mrs. Berg argues that under 42 USC §2000e-5(g), the District Courts may grant injunctive relief to prevent *threatened* violations of Title VII, and that the Act contemplates the prevention of Title VII violations as a basis for EEOC charges and adjudications. This claim cannot be squared with the language of the statute or the cited decisions. Section 2000e-5(g) requires the Court to find:

> ". . . that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ."

There is nothing in the statute or cases which contemplates adjudication of Title VII violations which are merely threatened, without a finding of past or existing culpable conduct.

The Court can take notice that the Equal Employment Opportunity Commission and the lower Federal Courts are deluged with claims under Title VII. A rule permitting speculative EEOC charges, and compelling their processing by the EEOC and adjudication by the courts, can only dilute the capacity of those agencies to deal directly and promptly with charges that represent mature, de facto grievances.

B. THE RECORD DOES NOT SUPPORT MRS. BERG'S CLAIM THAT THE DISTRICT COURT MADE A FINDING OF IRREPARABLE INJURY ON HER MOTION FOR PRELIMINARY INJUNCTION.

In her statement of the case, Mrs. Berg asserts, with reference to the District Court's preliminary injunction:

> "The District Court grounded its order upon a finding of irreparable injury absent injunction . . . ." (Respondent's Brief, p. 6.)

Nowhere in its order granting motion for preliminary injunction (Petition for Certiorari, App. C. pp. 30-34) does the District Court make a finding of irreparable injury. The words "irreparable injury" are not so much as mentioned. Given the failure to find irreparable injury, the District Court erred in granting Mrs. Berg a preliminary injunction. (See: *Sampson v. Murray,* 415 U.S. 61 [1974].)

C. MRS. BERG HAS NOT MET HER BURDEN OF PROOF TO DEMONSTRATE FEDERAL COURT JURISDICTION UNDER TITLE VII NOTWITHSTANDING THAT HER EEOC CHARGE WAS NOT UNDER OATH.

> "If the jurisdictional allegations are challenged they must be proved, and the party invoking federal jurisdiction has the burden of proof."
>
> Wright, *Law of Federal Courts* 2d Ed., 292.

(See: *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1935); *Roberts v. Lewis,* 144 U.S. 653 [1892].)

Mrs. Berg's complaint alleged jurisdiction under Title VII. (A. 5, ¶II.) This allegation was denied by the School District's answer. (A. 87, ¶II.) Notwithstanding Mrs. Berg's burden of proof with respect to the jurisdictional basis of her action, the School District introduced her EEOC charge. (A. 108-109.) (The Ninth Circuit has declined to require that compliance with the jurisdictional prerequisites be specifically alleged in Title VII cases: *E.E.O.C. v. Wah Chang Albany Corp.,* 499 F.2d 187 [9th Cir. 1974]. This rule shifts the effective burden of proof as to jurisdiction in such cases from plaintiffs to defendants. See: *Oakland Federation of Teachers v. Oakland Unified School District,* ..... F.Supp. ....., 10 FEP Cases 836 [N.D. Cal. 1975].)

Mrs. Berg's charge shows on its face that it was not under oath and not in the form required by the Commission. (42 USC §2000e-5(b)2.) It became Mrs. Berg's duty to demonstrate to the trial court any basis upon which to avoid these requirements. The School District filed and served a copy of the charge on August 13, 1973. (A. 3.) The Judgment of the District Court was not filed until December 4, 1973 (A. 4.) During this time, Mrs. Berg did nothing to remedy the defect in her charge.

Mrs. Berg's brief introduces several assertions of fact which she contends excuse her failure to meet this express statutory requirement. She alleges a promise by the EEOC which was not fulfilled. She alleges that the School District was not prejudiced by the defect in her charge. She alleges that her oath

was not material because her charge was true. None of these claims were raised before the trial court, and none are substantiated by the record in this case. In any event, given her burden of proof, and given the time that elapsed between the date that the School District made her charge a matter of record and the date of entry of judgment, the facts she alleges at this time do not excuse the defect in her charge.

D. MRS. BERG'S RESPONDING BRIEF DOES NOT SUBSTANTIATE THE NINTH CIRCUIT'S JURISDICTIONAL DECISION.

1. Mrs. Berg misunderstands the legal principles governing federal court jurisdiction.

Mrs. Berg argues:

> ". . . nowhere in Title VII did Congress state, as petitioners wish, that a preliminary injunction to prevent Title VII's violation until after the EEOC sends a letter to an aggrieved person who has filed a charge, nor that issuance of such a letter within two and one-half (2½) weeks after suit is commenced on the independent jurisdictional bases of Title VII and section 1983 requires the complaint to be dismissed and refiled, rather than being supplemented pursuant to F.R.C.P. Rule 15(d), as was ordered in the case at bar. (A. 94)." (Respondent's Brief, p. 19).

This argument presupposes that federal courts are courts of general jurisdiction and must entertain claims under federal legislation unless Congress expressly limits their powers. It is the petitioner's understanding that a different rule applies.

> "It is a principle of first importance that the federal courts are courts of limited jurisdiction. . . . They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress."
>
> Wright, *Law of Federal Courts, 2nd Ed.,* 15.

> "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined'."
>
> *Victory Carriers v. Law,* 404 U.S. 202 at 212 (1971), quoting *Healy v. Ratta,* 292 U.S. 263 at 270 (1934).

In *Nat. R.R. Passenger Corp. v. Passengers Assn.,* 414 U.S. 453 (1974), this Court ruled that when a federal statute expresses a particular mode for the exercise of federal court jurisdiction, it includes the negative of any other mode. Congress has established conditions that must be met before a private action may be instituted under Title VII. This Court has identified certain of those conditions as jurisdictional prerequisites. The decision in *Victory Carriers v. Law, supra,* shows that such jurisdictional prerequisites must be strictly respected. The decision of the Ninth Circuit in this case permits avoidance of those statutory conditions.

2. Mrs. Berg received a premature notice of her right to sue.

Mrs. Berg has argued that nothing in Title VII prohibits the Attorney General from issuing a notice

of right to sue before the statute's 180 day investigation and conciliation period has expired. But the Commission has interpreted the statute differently. Absent the dismissal of a charge, 29 C.F.R. §1601.25b(c) authorizes the charging party to demand a right to sue notice only after 180 days have passed from the date the charge was filed. The Courts have also interpreted the statute differently from Mrs. Berg. In *Occidental Life Ins. Co. v. E.E.O.C.*, ... U.S. ..... (1977), this Court stated that a private right of action does not arise until the 180 day period expressed in 42 USC §2000e-5(f)(1) has expired.

Mrs. Berg's notice was issued prematurely, in violation of both the statute and the regulation.

3. The Rule of Mollan v. Torrance should be applied in this case.

The theory adopted by the Ninth Circuit in this case, and by the decision in *Henderson v. Eastern Freight Ways,* 460 F.2d 258 (4th Cir. 1972), permits a Title VII complaint to be amended to confer jurisdiction on the basis of facts occurring after the complaint was filed. This theory is contrary to the rule expressed in *Mollan v. Torrance,* 9 Wheat. 537 (1824), and *Minneapolis & St.L.R. Co. v. Peoria & P.U.R. Co.,* 270 U.S. 580 (1926) that federal court jurisdiction depends upon the facts existing when an action is filed. The School District believes it is entitled to have the rule applied in its favor in this case, or to this Court's decision that the rule is changed.

Notwithstanding that it might be inconvenient to require that a new action be commenced when jurisdictional facts occur after the commencement of a federal court action, the District believes that result in required as a matter of policy and principle.

First, the rule in *Mollan v. Torrance* is an intelligible, certain rule, long established and followed. These are significant virtues, the value of which is recognized in this Court's decision in *American Fire & Cas. Co. v. Finn,* 341 U.S. 6 (1951).

Second, a departure from the rule will introduce material uncertainty into a fundamental area of the law. If jurisdiction can be based upon a notice received two weeks after the commencement of an action, in principle, a notice two years late will also suffice. (Compare *Spirt v. Teachers Ins. & Annuity Assn.,* 416 F.Supp. 1019 [S.D.N.Y. 1976].) The principle of decision expressed below and in *Henderson* is not limited to Title VII litigation.

Third, a departure from the rule in this case will effectively defeat the provisions enacted by Congress to encourage an administrative approach to problems of alleged discrimination under Title VII. Recognizing the great social and economic costs of litigation, this Court has historically supported the use of administrative forums for dispute resolution:

> "[It is] the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until

the prescribed administrative remedy has been exhausted."

Myers v. Bethlehem Corp., 303 U.S. 41 at 50-51 (1938).

II

THE RECORD ON MRS. BERG'S MOTION FOR SUMMARY JUDGMENT DOES NOT DEMONSTRATE INTENTIONAL DISCRIMINATION OR GENDER-BASED DISCRIMINATORY EFFECTS.

A. THE LOWER COURTS ERRONEOUSLY HELD THE SCHOOL DISTRICT'S POLICIES INVALID ON THEIR FACE

Mrs. Berg's motion for summary judgment in the District Court was limited in its factual basis.

> "By their Answer to plaintiff's Complaint defendants in the instant action have admitted every fact that is material to the establishment of plaintiff's claims under 42 U.S. Code section 2000e et seq. . . ." (A. 102.)

Insofar as Mrs. Berg's complaint alleged intentional discrimination or gender-based discriminatory effects, those allegations were denied by the answer. The District Court found that the controlling facts were not disputed and ruled in Mrs. Berg's favor as a matter of law. (Petition for Writ of Certiorari, Appendix C, pp. 39-43.) The decisions of the District Court and the Ninth Circuit were based on the EEOC guideline expressed in 29 C.F.R. §1604.10(b), and the general principle that employment policies and practices specific to pregnancy discriminated unlawfully on the basis of sex. (*Berg v. Richmond Unified School District,* 528 F.2d 1208, Petition for Writ of Certiorari, Appendix A, 1-11; *Hutchison v. Lake Oswego School District No. 7,* 519 F.2d 961, Petition for Writ of Certiorari, Appendix A, 12-29.)

The brief for the petitioners argues that in light of this Court's decisions in *General Electric Company v. Gilbert,* 429 U.S. ..... (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), and *Geduldig v. Aiello,* 417 U.S. 484 (1974); the policies of the School District were not unlawful per se. Mrs. Berg therefore had the burden of proving that those policies were a pretext for unlawful gender-based discrimination. (*General Electric Company v. Gilbert, supra.*) Mrs. Berg's responding brief does not address the argument the School District advanced as to the prima facie validity of its policies.

The amicus brief of the National Education Association attempts to substantiate the decision of the lower courts by attacking the principles of the *Gilbert* decision. The *amicus* argues that *Gilbert* should be limited to fact situations involving pregnancy coverage under disability insurance policies.

In this case, state law (Education Code §13468, see Brief for Petitioners, Appendix A, p. viii) provided limited, cumulative sick leave rights for absence due to "illness or injury." Amicus contends that disability insurance is to be distinguished from sick leave in that sick leave is an element of an employee's salary but disability insurance is not. This is a fallacious argument. The controlling law is that of contract. Under contract law, both disability insurance and

sick leave entitlements, if provided, are elements of the consideration provided for the work of an employee. In California, the relationship between a school district and its personnel is that of employer and employee, and this relationship is created by contract. The employment contracts between California school districts and their employees include applicable statutory provisions and governing board rules and regulations. (*Holbrook v. Board of Education,* 37 Cal.2d 316 at 331, 231 P.2d 853 [1951]; *Frates v. Burnett,* 9 Cal.App.3d 63 at 69, 87 Cal.Rptr. 731 [1970].) Contract rights are subject to the lawful conditions that apply when the contract is entered into. The fact that sick leave might provide different benefits than disability insurance does not justify a legal distinction in their treatment under Title VII. Sick leave is like insurance because the right to use sick leave occurs only under the conditions defined in the plan, and accrued sick leave credit is lost upon the termination of employment if the conditions under which its use is allowed do not occur. The District might have purchased disability insurance for its employees as excess coverage, inclusive or exclusive of pregnancy. Petitioner does not believe it can be credibly argued that different principles of decision under Title VII should apply as between disability insurance and sick leave programs.

B. THE RECORD DOES NOT SHOW THAT THE DISTRICT'S POLICIES WERE PURPOSEFULLY DISCRIMINATORY OR HAD A DISPARATE ADVERSE EFFECT ON WOMEN.

1. The record does not support the contentions of Mrs. Berg and amicus National Education Assocation that the School District's rights to decide a beginning leave date and to require an examination by its physician were limited to pregnant employees.

In asserting that the record in this Case demonstrates purposeful sex discrimination or a disparate impact on women, Mrs. Berg and the amicus have made claims such as the following:

> "[Petitioners] justify compulsory leave and mandatory physical examinations for the class of pregnant women . . . *and for no other class of employees.* . . ." (Respondent's Brief, p. 21, (emphasis original) see also pp. 29, 33-34.)
>
> . . .
>
> "That this policy had a disparate impact on women is, we submit, undeniable. By its very terms, it affected women only. There was no similar policy applicable to employees with any other physical impairment or illness." (Amicus Brief, p. 11, see also p. 13.)

Insofar as such claims were advanced by Mrs. Berg's Complaint (A. 11-12, ¶XIII and XIV), they were denied by the District (A. 89, ¶XIII and XIV). The affidavit of Sam Teese in opposition to the motion for preliminary injunction stated:

> "The regulations of the Richmond Unified School District provide for physical or mental examinations of teachers by a District approved physician at District expense whenever the Disamination is required for the safety or welfare

trict Superintendent concludes that such an ex- of students or school employees." (A. 50.)

Mrs. Berg's motion for summary judgment did not offer any evidence to substantiate the allegations of her complaint or to rebut the statement of Mr. Teese. Mrs. Berg filed as Exhibit B to her points and authorities in support of temporary restraining order and motion for preliminary injunction, Section 131.07 of the District's regulations, which provides that the District may require a physical examination by its own physician before granting a "health leave." (A. 75.)

Furthermore, at the time of Mrs. Berg's summary judgment motion, California law authorized school district governing boards to summarily suspend or transfer employees believed to be mentally ill; and such employees were required to submit to examination by members of a district selected panel of psychiatrists. (California Education Code §13411, renumbered §44942 effective April, 1977. See Appendix.)

Mrs. Berg's failure to introduce evidence substantiating the allegations of her complaint, the unchallenged affidavit of Sam Teese, the provisions of District Regulation 131.07, and the provisions of California Education Code §13411, demonstrate Mrs. Berg's failure to prove the proposition that the District's policies on medical examinations and the beginning date of leave were limited exclusively to pregnant, female employees.

2. The record does not support the contentions of Mrs. Berg and the National Education Association that the School District's interim maternity leave policy automatically forced pregnant women to undergo examination by its physician or forced pregnant women to begin maternity leave at a time when they were still capable of working.

Mrs. Berg and the amicus have argued:

> ". . . features of petitioners' leave policy that respondent contends . . . has discriminated . . . are (1) the compulsion upon every women to take leave at a given time, and the further compulsion upon any woman who seeks to work beyond the District's favored date to be examined by a doctor not of her own selection, but of the District's. . . ." (Respondent's Brief, p. 26; see also pp. 4, 20, 22 and 32.)
>
> ". . . the effect of petitioners' policy would be to force pregnant teachers to begin their maternity leave at a time when they are still capable of continuing to work." (Amicus Brief, p. 13; see also pp. 11 and 12.)

These arguments misconstrue the School District's policy as it was applied in Mrs. Berg's case. The Teese affidavit states that Mrs. Berg's employment could have continued beyond thirty days before her expected term if a report conforming to the policy had been received from her doctor; and that the District's claim to an examination by its own physician was contingent upon his determination after receiving her physician's report. (A. 49.)

Under the revised interim policy, the Assistant Superintendent's authority to determine a maternity leave date was conditioned by the express require-

ment that he take into account available medical information, the employee's job performance, and the interest and requirements of the district, its schools, classes, and pupils. If an employee wished to continue working beyond thirty days from the expected date of delivery, the employee was required to submit a factually detailed medical report from her own doctor. This report would have required the employee's doctor to consider the physical conditions involved in continued employment and to make a recommendation respecting continued employment, taking those factors into account, and disclosing the employee's state of health.

Although the District reserved general authority to require a medical examination by its own physician, it is pure speculation to say that this authority would have been invoked in all cases or even in Mrs. Berg's case. The detailed report required of the employee's physician was calculated to bring about agreement between the district's administrator and a pregnant employee, by informing them both of the critical facts. Nobody knows how Mrs. Berg's doctor would have responded if he had undertaken to provide a professional opinion about Mrs. Berg's continued employment, expressly taking into account the matters mentioned in the district's policy, at a time nearer than three months before her expected delivery date. Furthermore, nobody knows what Mr. Teese or Mrs. Berg would have done if her doctor had furnished an up-to-date medical report containing some factual data rather than gross conclusions.

Given the provisions of the revised interim maternity leave policy and the complete absence of any evidence as to its actual application, it is misleading for Mrs. Berg and the NEA to contend that the policy *automatically* compelled pregnant women to undergo examination by a school district physician. Absent any evidence as to the policy's application, the contention that Mrs. Berg or any other teacher would have been forced to take maternity leave when still capable of continuing to work is wholly unsubstantiated.

3. The record does not support Mrs. Berg's assertion that the School District maintained a scheme presuming that all pregnant teachers were disabled or irrational.

In her statement of the case, Mrs. Berg asserts:

> "At all times relevant hereto, petitioners maintained a dualistic scheme of treatment of pregnant teachers, presuming them to be disabled . . ." (Respondent's Brief, p. 4; see also pp. 20, 21, 22, 25, 27, 30, 32.)

To the contrary, the policy which the School District proposed to apply in Mrs. Berg's case involved neither a presumption nor a finding of disability or irrationality. The policy provided for the School District's ultimate determination of a beginning date of maternity leave, based on the individual facts presented by a pregnant employee upon her request to work later than thirty days before her estimated term. The policy identified "available medical information, the employee's job performance, and the interests and requirements of the district, its schools'

classes, and pupils" as factors applicable in determining a maternity leave date. (A. 17.)

The affidavit of Sam Teese identified the manner in which some of these factors would be applied, taking into account class schedules, vacations, semester breaks and the availability of substitute teachers. (A. 50-51.) The element of individualized consideration, the requirement that the District have specific medical information (in the first instance, from the employee's own physician), and the right to appeal an adverse decision, rule out the existence of any "presumption" necessarily acting in the case of all pregnant employees to determine when their maternity leave should begin. Disability is not mentioned in the policy, and irrationality is not mentioned in the record of this case.

4. The record does not support Mrs. Berg's assertions concerning sex-stereotyping.

Mrs. Berg argues that a "sex-stereotyped image of pregnant school employees" is "central to respondent's claim that petitioner's . . . policy . . . is sex discriminatory." (Brief for the Respondent, p. 28.) Mrs. Berg claims that the primary evidence of sex-stereotyping consists of the affidavit of Dr. Thebaut. (A. 52-56.) Mrs. Berg points out a number of statements in that affidavit to which she takes exception. But Mrs. Berg does not show, or even directly allege, that the statements contained in Dr. Thebaut's affidavit are incorrect in any respect. Mrs. Berg's charge of sex-stereotyping is misplaced. The courts are agreed that it is impermissible under Title VII to take ad-

verse employment actions against individuals based on stereotyped sex characterizations rather than individual capacities. (*Dothard v. Rawlinson*, ... U.S. ....., [1977]; *Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038 [3rd Cir. 1973].) But the District's revised interim maternity leave policy provides for determinations based upon the facts presented by the individual pregnant employee. No court has questioned the right of an employer to obtain the facts necessary to made an informed determination concerning employment.

5. The record does not support Mrs. Berg's assertion that the District enforced its formal regulation on maternity and paternity leaves.

Mrs. Berg asserts in her Statement of the Case (Respondent's Brief, p. 2) and argues in her brief that the District enforced its formal regulation respecting maternity leave. Mrs. Berg's complaint alleged that the defendants promulgated or enforced Section 131.10 of the District regulations under which pregnant employees were required to take pregnancy leave no later than the seventh month of pregnancy, and a day of paternity leave with pay was allowed. (A. 8, 16; ¶VII and Exhibit A.) The defendants' answer admitted existence of the regulation but denied the other allegations in Paragraph VII of the Complaint. (A. 87-88; ¶VII.)

As to the seventh month leave requirement, the District had departed from its formal regulation and had adopted an interim policy before Mrs. Berg requested maternity leave. (A. 9, ¶IX and ¶X.) Mrs.

Berg did not allege that the seventh month requirement was enforced as to her. There is no allegation or showing on the record that the seventh month policy was enforced as to anybody else. There is likewise no showing on the record that the paternity leave regulation was enforced.

C. MRS. BERG'S SUMMARY JUDGMENT MOTION DID NOT MAKE A SHOWING THAT ENTITLED HER TO JUDGMENT

Mrs. Berg argues that her motion for summary judgment established her right to relief and shifted the burden of proof to the District. But this case was decided below upon a premise different than that now advanced by Mrs. Berg. The District Court and the Court of Appeals believed that under 29 CFR §1604.10(b), any employment practice or policy specific to pregnancy was sex discriminatory, ipso facto. If those courts were correct it is true that upon demonstration of the policies, without more, the burden of proof shifted to the District. But in *Gilbert* this Court held that policies specific to pregnancy are not prima facie sex discriminatory. Under *Gilbert* the plaintiff must make a showing that a policy involving pregnancy is intentionally sex discriminatory or at least that such a policy in fact results in greater benefits to men than to women, to establish a prima facie case of sex discrimination.

Mrs. Berg and the amicus National Education Association have argued at length that the limited factual showing in this case supports a finding by this

Court of intentional sex discrimination or of disparate adverse effect upon women. The District has demonstrated that these arguments are predicated upon factual assertions which are not substantiated by the record.

Dated, July 28, 1977.

Respectfully submitted,

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SILVANO B. MARCHESI,
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Of Counsel.

(Appendix Follows)

APPENDIX

CALIFORNIA EDUCATION CODE

§13411 (§44942).

(a) Any certificated employee may be suspended or transferred to other duties by the governing board if the board has reasonable cause to believe that the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties.

(b) The governing board shall forthwith, upon any suspension or transfer hereunder, give to the employee a written statement of the facts giving rise to the board's belief, and an opportunity to appear before the board within 10 days to explain or refute the charges.

(c) If, after the employee's appearance before the board, the board decides to continue the suspension or transfer, or if the employee chooses not to appear before the board, the employee shall then be offered, in writing, the opportunity of being examined by a panel of three psychiatrists selected by him from a list of psychiatrists to be provided by the board. To assist the panel in making their determination, the governing board shall supply to the panel, prior to the date scheduled for the psychiatric examination, a list of the duties of the position from which the employee was suspended or transferred. The employee shall continue to receive his regular salary and all other benefits of employment during the period dating from his suspension to the filing of the report of the panel with the governing board.

(d) The psychiatric examination shall be conducted at school district expense within 15 days of any suspension or transfer ordered hereunder. The employee shall submit to the examination, but shall be entitled to be represented by a psychiatrist or physician of his own choice, and any report of the psychiatrist or physician selected by him shall be filed with the panel at the request of the employer.

A written report of the panel on the examination of the suspended or transferred employee shall be submitted to the governnig board within 10 days after completion of the examination. A copy shall be supplied to the employee upon request. The report shall contain a finding on whether the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties.

(e) If a majority of the panel conclude that the employee should be permitted to return to his duties, no written record of the suspension or of the determination of the panel shall be retained, and in all respects any written record concerning the employee shall appear as it did before the suspension was made.

(f) If a majority of the panel find in their report that the employee is suffering from mental illness of such a degree as to render him incompetent to perform his duties, the governing board may, upon receipt of the report, place the employee on mandatory sick leave of absence. Any mandatory sick leave of absence imposed under this section shall not exceed two years, during which period the employee shall be entitled to sick leave, hospital and medical benefits

which he accrued during his employment by the governing board but only to the extent of such accrual.

(g) Any employee placed on mandatory sick leave of absence pursuant to this section may in writing immediately demand a hearing. Thereupon the governing board shall file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether they constitute sufficient grounds for placing the employee on mandatory sick leave of absence, and for a judgment pursuant to its findings.

(h) If the court finds that the employee was not at the time of the suspension incompetent to perform his assigned duties and should not have been placed on mandatory sick leave of absence, the employee shall be immediately reinstated to the same or a substantially similar position with full back salary, and any written record of the suspension or transfer or any report of the panel shall be destroyed.

(i) If the court confirms the placing of the employee on mandatory sick leave, or if the employee does not seek a hearing, then upon written request of the employee made not earlier than six months nor later than two years after the date he was placed on mandatory sick leave of absence, a new panel of three psychiatrists shall be convened by, and at the expense of, the governing board to review its original conclusion. If the original conclusion is not

changed by the new panel as a result of such review, the employee shall be continued on the mandatory sick leave of absence except that when the employee's total period of absence exceeds two years, the governing board shall either rescind its action and reinstate the employee to the same or a substantially similar position, or shall serve the employee with a notice of intention to dismiss him, and proceed according to Section 13412.

(j) If a majority of the new panel concludes in its report, or any subsequent review thereof, that the suspended employee or employee on mandatory sick leave of absence should be permitted to return to his duties, or if the court so concludes, the governing board shall take immediate action to restore the employee to the position from which he was suspended or transferred or to a substantially similar position.

(k) Every hearing and action by or before the governing board pursuant to this section shall be in executive session, and no decision, action, or occurrence therein shall be made public, unless the employee so requests in writing.

(l) Nothing in this section shall be construed to supersede Section 13443.

MOTION FILED

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75-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted]

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE

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MOTION OF NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association (NEA) hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae,* in support of the position of the respondent. Respondent has consented to the filing of this brief, but petitioner has denied such consent.

NEA, organized in 1857 and chartered by special act of Congress in 1906, is the nation's oldest and largest organization of professional educators. It is also the largest organization of public employees in the nation, with more than 1.5 million members. NEA's purposes, as set forth in its Charter, are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States."

NEA is strongly committed to the eradication of all forms of discrimination on the basis of race, sex, or other arbitrary classifications, particularly in the field of public education. It has frequently filed briefs as *amicus curiae* in this Court in cases involving issues of discrimination or other matters of particular concern to NEA's membership.

NEA's interest in this particular caes is two-fold. First, the basic substantive[1] question presented in this case—namely, whether Title VII of the Civil Rights Act of 1964, as amended, requires an employer to treat pregnancy the same as other forms of disability for purposes of disability leave and salary continuation—is a recurring one, which affects a large percentage of teachers throughout the country. Second, the case will require the Court to interpret and apply its recent decision in *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). There has been considerable confusion and debate as to whether that case modified certain basic legal principles which had heretofore been developed

[1] This case also presents several procedural and jurisdictional issues. While NEA also has an interest in these issues, it does not believe it can contribute anything to the arguments concerning them which will be made by respondent. Accordingly, our brief is limited only to the substantive issues in this case.

under Title VII of the Civil Rights Act of 1964, or whether it merely applied those principles to the particular facts of that case. The Court's interpretation of *Gilbert* in this case could affect not only future cases involving issues relating to the rights of pregnant employees, but many other types of cases under Title VII as well.

The briefs and arguments of the parties will necessarily concentrate on the specific facts and issues in this particular case. NEA's brief, on the other hand, concerns itself primarily with the broader legal issues, particularly the meaning of the *Gilbert* case. Thus, we will not deal with the issue of whether the employment policies involved in this case were purposefully discriminatory, since that issue will be fully briefed by respondent. Our concern, rather, will be to show that those policies, whatever their intent, had a discriminatory effect, and that *Gilbert* did not alter the established principle that employment policies which have such an effect are prohibited by Title VII unless they are shown to serve some business necessity. We believe that our analysis of these issues is somewhat different than respondent's, and will be of assistance to the Court.

Respectfully submitted,

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1. Is it violative of Title VII for an employer to require a pregnant female employee to take leave from her job at a time when her own physician certifies that she is able to continue working, if no similar requirement is imposed on employees with other medical conditions?

2. Is it violative of Title VII for an employer to refuse to permit an employee on maternity leave to draw accrued sick pay, when such pay is made available in the case of all other forms of disability?[1]

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[1] While these issues are within the scope of the grant of certiorari in this case, we note that the Court has declined to give plenary consideration to other recent cases involving similar pregnancy and maternity issues, but instead has vacated the judgments below and remanded for further consideration in light of *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). See *Communications Workers* v. *American Tel. and Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *judgment vacated*, 97 S.Ct. 724 (1977); *Hutchinson* v. *Lake Oswego School District No. 7*, 519 F.2d 961 (8th Cir. 1975), *judgment vacated*, 97 S.Ct. 725 (1977); *Social Service Employees Union* v. *Women in City Government United*, —— F.2d —— (2d Cir. 1976), *judgment vacated*, 97 S.Ct. 724 (1977). Accordingly, it appears that the Court may have granted certiorari in this case chiefly to examine the procedural issues which the case also presents. In such event the Court may wish to take account of the fact that effective January 1, 1976—*i.e.*, after the decision of the Court of Appeals in this case—Section 13456 of the California Education Code was amended to prohibit petitioner School District, as well as other California school districts, from engaging in the practices out of which this case arose, by providing:

> "The governing board of any school district shall provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duties because of pregnancy, miscarriage, childbirth, and recovery therefrom. The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.
>
> Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment by any school district."
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> • • •

Under these circumstances we believe the Court would be warranted in dismissing its writ as improvidently granted insofar as these substantive issues are concerned, as it has done on prior occasions when laws or regulations adopted subsequent to the conduct giving rise to litigation have settled the issue involved for the future. See, e.g., *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *Quinn* v. *Muscare*, 425 U.S. 560 (1976); *Cook* v. *Hudson*, 97 S.Ct. 543 (1976).

Petitioners' basic position is that these issues are controlled by the Court's decision in *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976). They construe that case as broadly holding that Title VII does not prohibit an employer from treating pregnancy differently from other forms of disability for *any* purpose, including involuntary leave or eligibility for accumulated sick pay.

We disagree with petitioners' interpretation of *Gilbert*, and the main purpose of this brief is to demonstrate that their interpretation is erroneous. To do so, we shall first demonstrate that *Gilbert* did not change the basic standards which govern under Title VII, but merely applied them to the particular facts involved in that case. We shall then show that the facts of this case are significantly different from *Gilbert*, and that under controlling principles which were reaffirmed in *Gilbert*, a different result is required here.

ARGUMENT

I.

THE DECISION IN GENERAL ELECTRIC CO. v. GILBERT DID NOT ALTER THE ESTABLISHED RULE THAT AN EMPLOYMENT PRACTICE WHICH HAS AN ADVERSE EFFECT ON WOMEN OR MINORITIES CONSTITUTES A PRIMA FACIE VIOLATION OF TITLE VII

In *General Electric Co.* v. *Gilbert, supra,* the Court was concerned with a disability insurance plan, under which employees who became totally disabled as a result of nonoccupational sickness or accident received a weekly benefit equal to 66⅔ percent of their normal straight-time earnings. The issue before the Court was whether the exclusion of pregnancy-related disability from coverage under this plan violated Section 703 (a)(1) of the Civil Rights Act of 1964, which makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1).

As described by the Court, the employer's plan was "nothing more than an insurance package, which covers some risks, but excludes others" (97 S.Ct. at 409). The Court concluded that the plan did not discriminate against women since it provided precisely the same benefits to both sexes, and the cost of providing those benefits was actually higher for women than for men. Thus, the Court explained:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the even-handed *inclusion* of risks." 97 S.Ct. at 409-10 (emphasis in original; footnote omitted).

The Court was also guided by its earlier decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Although *Geduldig* arose under the Equal Protection Clause of the Fourteenth Amendment, the Court in *Gilbert* found the concepts of discrimination evolved under that Clause to be "a useful starting point" in interpreting the language of Section 703(a)(1)—particularly since the term "discriminate," as used in that Section, is not defined in Title VII itself (97 S.Ct. at 406-07). *Geduldig,* as the *Gilbert* opinion stated, involved a "strikingly similar disability plan" (*id.* at 407), administered by the State of California, and funded entirely from contributions deducted from the wages of participating employees. The plan provided benefits based on amount of prior earnings, with periods of payment and types of coverage—including the exclusion of pregnancy-related disabilities—very much like the General Electric plan. Pointing out that "a totally comprehensive program would be substantially more costly than the present program," and would require increased employee contributions or reductions in other coverage (417 U.S. at 495-96), the Court concluded in *Geduldig* that the pregnancy exclusion was not invalid because the "fiscal and actuarial benefits of the program . . . accrue to members of both sexes" and there was no showing that the financial benefits of the

plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program" (417 U.S. at 497 & n.20).

The key element in both *Gilbert* and *Geduldig* was the Court's conclusion that despite the exclusion of pregnancy, the overall insurance scheme in each case did afford parity of benefits to men and women. There is thus no warrant for assuming—as petitioners do in the instant case—that the results in those two cases must control in factually different situations, merely because the claimed violation arises out of the employer's practices with respect to pregnancy or maternity. *Gilbert*, after all, neither overrules nor questions this Court's first Title VII decision—*Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)—in which an employer's refusal to employ mothers of pre-school age children was held to constitute a prima facie violation of the Act.

Moreover, the Court's opinion, read together with the two concurring opinions, makes clear that a different result would be required if it is shown that the employer's practices with respect to pregnancy or maternity have a discriminatory *effect*. While the Court indicated that a discriminatory *purpose* may be required to establish a violation of Section 703(a)(1) of the Act, it recognized that a showing of discriminatory *effect* is sufficient under Section 703(a)(2), under principles established in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[2] Thus, the Court stated:

[2] Mr. Justice Brennan's dissenting opinion in *Gilbert* cited "unexplained and inexplicable implications" in the Court's opinion that he viewed as inconsistent with the holding in *Griggs* that a prima facie violation of Title VII is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class (see 97 S.Ct. at 417). However, the only such "implications" in the Court's opinion were with reference to Section 703(a)(1), the provision under which *Gilbert* arose. The Court's statements concerning Section 703(a)(2)—discussed in the text, *supra*—make clear that the *Griggs* principle would still be applicable under that section. Moreover, two of the six members of the Court who concurred in the Court's opinion—as well as the three dissenters—all disassociated themselves from any implication that a showing of discriminatory intent is required to establish a violation of Title VII, or that the decision in *Griggs* v. *Duke Power Co.* is no longer good law. See 97 S.Ct. at 413 (concurring opinions of Mr. Justice Stewart and Mr. Justice Blackmun); *id.* at 417 (dissenting opinion of Mr. Justice Brennan and Mrs. Justice Marshall); *id.* at 420-21 (dissenting opinion of Mr. Justice Stevens).

> "[O]ur cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. See *Washington* v. *Davis*, —— U.S. ——, ——, 96 S.Ct. 2040, 2050, 48 L.Ed.2d 597 (1976). For example, in the context of a challenge, under the provisions of § 703(a)(2), to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were 'invidiously to discriminate on the basis of racial or other impermissible classification,' *Griggs* v. *Duke Power Co.*, . . ." 97 S.Ct. at 408 (emphasis in original; footnotes omitted).

The Court's opinion—together with the emphatic statements of two of the six concurring justices that their concurrences were premised on the lack of proof of discriminatory effect in that particular case—reaffirms the continuing validity of the "discriminatory

effect" test applied under Section 703(a)(2), the language of which does not include the word "discriminate," but rather forbids an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2).

That this provision does not require proof of discriminatory intent was made clear in *Griggs,* where this Court recognized that if "absence of discriminatory intent" was controlling, a variety of employment practices would continue to "operate as 'built-in headwinds' for [protected] groups." 401 U.S. at 432. It accordingly concluded:

> "The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected class] cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

After noting the lack of any proof of discriminatory intent on the part of the employer in that case, the Court emphasized:

> "But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432 (emphasis in original).

These principles have become of utmost importance to the meaningful implementation of Title VII, and have since been applied not only by this Court, but in numerous decisions of the lower courts, to invalidate testing practices, seniority and transfer restrictions, and other employment policies which, while facially neutral, nonetheless had the effect of disadvantaging groups which Title VII was intended to protect. *See, e.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); *United States* v. *Chesapeake & Ohio Ry.,* 471 F.2d 582 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652 (2d Cir. 1971); *Green* v. *Missouri Pacific R.R.,* 523 F.2d 1290 (8th Cir. 1975); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *United States* v. *St. Louis-San Francisco Ry.,* 464 F.2d 301 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973).

Once it is established that an employer's practice has a disproportionate impact upon protected groups, *Griggs* makes clear that the burden shifts to the employer to show that the practice is required by "business necessity." And the lower courts have repeatedly emphasized that an employer does not meet this burden merely by showing that the practice is designed to serve some nondiscriminatory business purpose. The rule must be "essential" to its stated goal. "[I]f the legitimate ends . . . can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued"

United States v. *Bethlehem Steel Corp., supra,* 446 F.2d at 662. See also *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 796-97; *United States* v. *St. Louis-San Francisco Ry., supra,* 464 F.2d at 308.

The *Gilbert* decision did not question any of these principles. Rather, as noted above, the result in that case was based on the Court's conclusion that the insurance plan there in issue was not only not purposefully discriminatory, but also had no disparate adverse impact on female employees. As we now show, the same cannot be said of the maternity-leave and disability-pay policies in issue in the present case.

II.

THE EMPLOYMENT POLICIES AT ISSUE IN THIS CASE, UNLIKE THE INSURANCE SCHEME INVOLVED IN GILBERT, HAD A DISPARATE ADVERSE IMPACT ON WOMEN, AND SINCE THEY WERE NOT REQUIRED BY ANY BUSINESS NECESSITY THEY VIOLATED TITLE VII

As the above discussion indicates, a violation of Title VII may be established not only by showing that an employment rule or practice is discriminatory in purpose, but also by showing that it has a disparate adverse effect on minorities or women. We believe both elements are present in this case. However, since respondent's brief has emphasized the intentional discrimination aspects of this case, we see no need to discuss that issue here. Rather, our purpose will be to show that the employment policies in issue in this case —whatever their intent—did have a disparate adverse impact on women, and that petitioner has utterly failed to justify those policies in terms of any business necessity.

A. The Maternity Leave Policy

Let us consider first petitioners' maternity-leave policy. At the time this case first arose, that policy required all pregnant teachers to commence maternity leave no later than the beginning of the seventh month of pregnancy. Subsequently the policy was revised, but even under the revised policy the ultimate power to decide when the teacher must stop working rested with the school administration, rather than with the teacher herself and her physician. Furthermore, if the teacher wanted to work beyond the eighth month, she was required to submit to the indignity of a physical examination by a doctor selected by the administration. And even if that doctor certified that the teacher was able to continue working, the administration could still overrule him and force the teacher to take leave.

That this policy had a disparate impact on women is, we submit, undeniable. By its very terms, it affected women only. There was no similar policy applicable to employees with any other physical impairment or illness. There are, of course, many illnesses—*e.g.,* high blood pressure, diabetes, epilepsy, heart disease, cancer—which may impair a teacher's ability to teach, depending on the nature and severity of the particular case. Yet petitioners had no rule requiring teachers with such illnesses to obtain special permission from the administration to continue working, or requiring such teachers to submit to a mandatory physical examination by someone other than their own physician in order to retain their jobs. So far as appears, a teacher suffering from any such illness would be permitted to decide for himself, with the advice of his physician, whether he is capable of performing his job.

Petitioners suggest that they would require any teacher to submit to a physical examination if circumstances warranted it, since "[e]very employer must be able to act when an employee's work is affected by medical conditions or injuries." (Pet.Br. 44.) But the maternity-leave policy did not call for the intervention of the school administration only in those cases where "an employee's work is affected" by her pregnancy. Rather, the policy applied to *all* pregnant teachers, without regard to whether their work was affected by their pregnancy. For example, at the time plaintiff was directed to take a physical examination, and was denied permission to continue working, there was no indication whatever that her pregnancy was affecting her work.

In short, petitioners imposed much stricter standards and procedures on pregnant teachers desiring to continue working than were imposed on teachers with any other physical condition. The adverse impact which this policy had on female teachers is demonstrated by the facts of this case. Under the policy, plaintiff would have been forced to quit working a full month before her baby was born. It is now quite clear that she was perfectly capable of continuing to work until the very day before delivery. In fact, she *did* work up to that day, by virtue of the preliminary injunction granted by the court below, and there is no evidence that her work suffered in any respect whatsoever. Nor is there any reason to believe that plaintiff's ability to continue working through the ninth month was unique or unusual. As one District Court found in a similar case:

> "In the trial, both parties offered the testimony of highly qualified physicians—obstetricians, gynecologists, hematologists and psychiatrists in support of their respective positions. These witnesses, whether called by the plaintiff or the defendant, indicated that the decision as to when a pregnant women should cease her outside work was an individual one to be made by the physician and the patient. . . . The experts almost entirely agreed that, in most cases, a women could work until the onset of delivery with proper diet, prenatal care and appropriate working conditions." *Newman* v. *Delta Air Lines, Inc.*, 7 FEP Cases 26, 31 (N.D. Ga. December 31, 1973.)

It is thus apparent that, in many cases, the effect of petitioners' policy would be to force pregnant teachers to begin their maternity leave at a time when they are still capable of continuing to work. Unlike the insurance program involved in *Gilbert*, which merely excluded pregnancy from the class of disabilities for which an employee was eligible to receive a monetary benefit while not working, the maternity leave policy in this case tended to deprive pregnant teachers of *employment*. Nothing in *Gilbert* suggests that an employer may treat pregnancy differently than other disabilities in determining whether an employee may remain employed. Surely, for example, an employer cannot adopt a policy of terminating any female employee who becomes pregnant, or of forcing such employees to take leave for the entire period of their pregnancy. While petitioners' policy was not so severe, it nevertheless suffered from the same basic defect as the hypothetical policies cited above—i.e., it imposed restrictions on the employment opportunities of pregnant employees which were not applicable to employees with other disabilities.[3]

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[3] In this respect, the maternity-leave policy at issue here is similar to the seniority policy at issue in *Nashville Gas Co.* v.

Petitioner seeks to justify its policy by citing a dictum in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 647 n.14 (1974), in which the Court noted that one method of determining a pregnant teacher's fitness to teach would be to "require the pregnant teacher to submit to medical examination by a school board physician. . . ." The issue which the Court was addressing in that case, however, was what method of determining a pregnant teacher's fitness to teach would satisfy the requirements of due process. *LaFleur* did not arise under Title VII, and the Court therefore had no occasion to consider or define the standards which would apply under that statute. The issue here, on the other hand, is whether petitioners' maternity-leave policy has the kind of disparate impact on female employees which is prohibited by Title VII. *LaFleur* can provide no guidance whatever on that issue.

As we have shown above, the policy clearly *did* have a disparate impact on female employees. It was therefore petitioners' burden to show that the policy was required by some business necessity. No such showing has been made. Indeed, it is obviously impossible for petitioners to make such a showing, since the California Education Code, § 13456, which governs maternity leaves, was amended as of January 1, 1976 to provide:

Satty, No. 75-536. In that case, the female employee who is placed on maternity leave loses her seniority, and is therefore unable to return to work unless a new vacancy occurs which is not filled by any other employee. Employees on sick leave, on the other hand, retain their seniority, and can exercise their seniority rights to return to work as soon as they are able to do so. On the basis of the reasoning set forth above, we believe this disparate seniority policy also violates Title VII, because it also singles out pregnancy for less favorable treatment than other forms of disability with respect to employment opportunities, and is not justified by any business necessity.

> "The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician."

By virtue of this statute, the maternity leave policy at issue in this case is no longer in effect, and no similar policy may be adopted by any school district in California. It is therefore hardly possible for petitioners to argue that the policy was *required* by any business *necessity*.

In any event, the only conceivable way in which petitioners' policy could be justified would be by proof that pregnant teachers and their physicians cannot be relied upon to make a correct determination as to when such teachers should commence their maternity leaves. Certainly no such proof was presented in this case. Indeed, the notion that the teachers themselves, who are college graduates holding responsible professional positions, cannot be trusted to exercise good judgment in such matters is contrary to all common sense. We submit that no one is better able to make that judgment—or more likely to do it correctly—than the teacher herself, with the advice of her physician. The assumption that teachers are so foolish or irresponsible that their employer must tell them when to stop working is not only unwarranted, it is insulting.[4]

[4] See Brief *Amicus Curiae* filed by the National Education Association and the Women's Equity Action League in *Cleveland Board of Education* v. *LaFleur*, October Term 1972, Nos. 72-777 & 72-1129, in which it was demonstrated that most school maternity policies are rooted in archaic Victorian attitudes toward pregnancy and women. The policy in this case, we believe, derives from these same origins, and reflects the kind of "'romantic paternalism,' which, in practical effect, put women not on a ped-

B. The Paid Sick Leave Policy

Although the paid sick leave issue in this case might appear, at first blush, to be similar to the disability insurance issue in *Gilbert*, we believe it is fundamentally different. As the Court noted in *Gilbert,* it is in the nature of insurance to cover some risks and not others. The Court therefore concluded that the exclusion of pregnancy from the bundle of risks covered by an insurance plan cannot be said to adversely affect women, so long as the risks which *are* covered affect men and women equally.

But paid sick leave is not a form of insurance. Rather, it is an element of an employee's salary. The underlying concept of paid sick leave is that a teacher is hired at an annual salary, which is payable even if the teacher is temporarily absent due to illness or disability, so long as such absences do not exceed a specified number of days per year. In this case, teachers were entitled to 10 days' paid sick leave per year, which could be accumulated from year to year.

This kind of plan cannot be described as "an insurance package, which covers some risks, but excludes others." See *Gilbert,* 97 S.Ct. at 409. Under an insurance scheme, a benefit is payable each time an employee incurs a covered illness or disability, regardless of whether he has received a benefit for some other illness or disability within the same year. But under a sick leave plan of the type involved here, an employee may receive only the amount of paid leave which he has accrued, regardless of how many different illnesses he may suffer. This is because paid sick leave is not in-

estal, but in a cage." *Frontiero* v. *Richardson,* 411 U.S. 677, 684 (1973).

tended to provide "insurance" against specified "risks," but is merely an element of the employee's salary. The concept is that the employee's annual salary includes up to 10 days' sick leave.

The refusal to permit pregnant teachers to draw their accrued sick leave pay therefore constitutes, in effect, a reduction of their salary. It is, in our view, no more justifiable than a reduction in salary of a pregnant teacher who continues working. Surely an employer could not adopt a policy of reducing by a specified amount the salary of any female employee who becomes pregnant, even if he could show that such a policy was not motivated by any intent to discriminate, but merely by a desire to save money. The effect of such a policy would be inherently discriminatory, and it would therefore violate Title VII unless it could be shown to serve some business necessity.

The holding in *Gilbert* that pregnancy can be treated differently than other risks for disability insurance purposes simply cannot be construed to mean that pregnancy can be treated differently for purposes of all other employment rights and benefits, such as the paid sick leave plan involved here. Such an interpretation would mean that an employer could lawfully refuse to hire pregnant women altogether, or pay them lower salaries, or deny them the holidays, vacations or any other benefits which other employees receive, without regard to whether such policies are required by any business necessity. These examples may seem farfetched, but they follow logically from petitioners' contentions in this case.

In order to determine whether the insurance plan in *Gilbert* had an adverse effect on women, the Court

looked to the effect of the benefits which the plan *did* provide, rather than the effect of the exclusion of pregnancy-related disabilities. This approach may have been valid in that case, since insurance by its nature "covers some risks, but excludes others." However, if the same analysis is applied to such matters as paid sick leave, employment opportunities, holidays, vacations, or other employment rights or benefits, an employer could exclude pregnant women from any benefit—indeed, from employment itself—without violating Title VII. It is entirely possible that, even with the exclusion of pregnant women from such benefits, the percentage of females who receive the benefit would be equal to or greater than the percentage of men. Nevertheless, the exclusion of pregnant women would undeniably disadvantage a large class of female employees on the basis of a condition which is unique to their sex. Such a result, in our view, would be totally at war with the policy of the statute, which is designed to insure equal treatment for *all* women. We submit, therefore, that when an employer excludes pregnant females from any employment right or benefit other than disability insurance, such exclusion cannot be justified merely on the basis that the right or benefit at issue is provided equally to all other employees, male and female. Rather, the exclusion itself, because of its adverse impact on female employees, must be justified in terms of a business necessity. And since no such justification was presented for the exclusion of pregnant females from the paid sick leave plan at issue here, that plan must be held to be unlawful under Title VII.[5]

[5] Even if this Court should determine, contrary to the arguments made above, that the sick leave plan involved here is analogous to the insurance plan involved in *Gilbert*, it would not follow that the present plan is lawful. The insurance plan in *Gilbert* was upheld on the basis of evidence showing that the actual benefits provided to women and the costs of those benefits were equal to or greater than the benefits provided to men. 97 S.Ct. at 405 & n.9. There is no similar evidence in this record. To be sure, *Gilbert* suggests that the burden of proving inequality of benefits rests with the plaintiff. But at the time plaintiff moved for and was granted summary judgment in this case she could not have anticipated that such a showing was required, since *Gilbert* had not yet been decided and the lower courts had uniformly held that any disability plan which treats pregnancy differently than other disabilities is a *per se* violation of Title VII. See cases cited in Justice Brennan's dissenting opinion in *Gilbert*, 97 S.Ct. at 413. Thus, even if this Court should now reverse the judgment below on the basis of its decision in *Gilbert*, simple justice would require that the case be remanded to afford respondent an opportunity to prove that the plan involved here, unlike the one in *Gilbert*, did not in fact provide equal benefits to men and women. *See Liss* v. *School District of Ladue*, 14 FEP Cases 771 (8th Cir., February 1, 1977).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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